Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Joel Cunigan, Mark Wiles, Asst. Chief Wayne Green, Sam Manley, John Telek, Richmond Police Department, The City of Richmond, Kentucky,

Petitioners,

v.

Ali Shamaeizadeh, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred by holding that the favorable termination rule in Heck v. Humphrey applies when a §1983 plaintiff was never convicted nor held in 'state custody' within the meaning of 28 U.S.C. §2254.

2. Whether the Sixth Circuit erred by holding that no exception to the favorable termination rule in Heck v. Humphrey exists for a §1983 claim of Fourth Amendment search and seizure violation.

PARTIES TO THE PROCEEDING

Petitioners

Joel Cunigan, Mark Wiles, Asst. Chief Wayne Green, Sam Manley, John Telek, Richmond Police Department, The City Of Richmond, Kentucky. The Petitioners have no parent corporations or non-wholly owned subsidiaries. The St. Paul Companies, formerly known as United States Fidelity & Guaranty Company is not a party to the appeal, but has a financial interest in the outcome of the appeal as the insurer providing a defense under an insurance policy for the City of Richmond and its employees, Joel Cunigan, Mark Wiles, Wayne Green, Sam Manley and John Telek.

Respondent

Ali Shamaeizadeh, M.D.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit below is reported at 182 F.3d 391 (6th Cir. 1999). A copy of that opinion is set out in Appendix A at pages 1a-18a. The opinion of the District Court for the Eastern District of Kentucky is set out in Appendix B at pages 19a-27a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on July 1, 1999. This Petition for Writ of Certiorari is filed within 90 days of that decision. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1343(3)-(4) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause,...particularly describing the place to be searched . . . .

28 U.S.C. §2254 (1999) State custody; remedies in Federal courts

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State. . ..

42 U.S.C. §1983 (1999) Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes

to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ..

STATEMENT OF THE CASE

The factual background of this case has been the subject of three prior opinions of the Sixth Circuit Court of Appeals, including the decision below and Respondent's two prior Sixth Circuit actions regarding his criminal prosecution. See Shamaeizadeh v. Cunigan, et al., 182 F.3d 391 (6th Cir. 1999), a copy of which is included in the App., *infra*, 1a-18a; U.S. v. Shamaeizadeh, 80 F.3d 1131 (6th Cir. 1996); U.S. v. Shamaeizadeh, 41 F.3d 266 (6th Cir. 1994). This statement of the case is taken primarily from those decisions.

Operative Facts. On March 14, 1994, the City of Richmond, Kentucky Police Department received a call from a woman claiming to be Teresa Schmitt regarding a possible burglary at a dwelling located at 121 Millstone Drive, Richmond, Kentucky. On that date, Respondent was living with Schmitt, his fiancé, in the upper level of a two-level house located at that address. Richmond Police Officer Mark Wiles was the first officer to arrive at the residence in response to the burglary call. Wiles learned from Schmitt that the residence was divided into separate living quarters. The main floor was occupied by Respondent and Schmitt, and the basement was leased to two tenants. At Schmitt's request, Wiles searched the entire house. While conducting the initial search, Wiles detected the smell of marijuana. App., *infra*, 3a.

After completing his walk-through, Wiles contacted Assistant Police Chief Wayne Grant for assistance. When Grant arrived, both officers conducted a second search of the basement

apartment. During the course of the second search, the officers discovered small marijuana cigarette butts, and fluorescent lighting of a type often used in indoor marijuana growing operations. After the second search, Officer Sam Manley and Officer Joel Cunigan were called in for assistance. Cunigan did not normally respond to burglary calls, but was experienced in detecting marijuana. Grant, Manley and Cunigan conducted a third search of the basement apartment and found additional marijuana-related contraband. Cunigan also detected a strong odor of growing marijuana. Schmitt then told the officers that she believed the basement tenants were growing marijuana. Cunigan then called a state prosecutor to help secure a search warrant, and submitted a sworn affidavit in support of his petition for a search warrant, which was issued by the Commonwealth of Kentucky's District Court judge for Madison County, Kentucky. After securing the search warrant, Cunigan and other law enforcement officers performed a fourth search. In the basement of Respondent's residence, three hundred and ninety-three (393) marijuana plants were found and seized. App., *infra*., 4a.

Respondent's Criminal Prosecution. The Richmond Police Department, upon recommendation of the local Commonwealth Attorney and representatives of the office of the U.S. Attorney for the Eastern District of Kentucky, agreed to turn over the evidence and prosecution of this matter to the United States. Respondent was never charged or arrested pursuant to any state criminal process. After the U.S. Attorney presented the case to a federal grand jury and an indictment returned on May 19, 1994, Respondent was arrested on a federal warrant issued pursuant to the indictment on or about May 24, 1994 for federal drug law violations under 21 U.S.C. §§841(a)(1) and 846, and under 18 U.S.C. §§2, and 924(c)(1). Additionally, Respondent was charged with renting the basement apartment to two

tenants for the purpose of unlawfully manufacturing, storing or distributing marijuana under 21 U.S.C. §846. App., *infra*, 4a.

On June 21, 1994, Respondent and his two tenants moved to suppress the evidence seized pursuant to the search warrant. App., *infra*, 21a. The motion to suppress was heard by U.S. Magistrate Judge James Todd. Officers Cunigan and Wiles were called to testify at the suppression hearing before the Magistrate Judge, but after this testimony, none of the Petitioners had any further direct involvement in Respondent's criminal prosecution. The Magistrate Judge found the first warrantless search was constitutional due to exigent circumstances. However, the Magistrate found the second and third warrantless searches were not constitutional, and recommended Cunigan's affidavit be redacted to reflect only the information obtained as a result of the first search and the conversations with Schmitt. The Magistrate Judge found the redacted affidavit did not provide probable cause to support the warrant and recommended that the seized evidence be suppressed.

On September 30, 1994, the District Court adopted the Magistrate Judge's recommendations and ordered the evidence suppressed. The government took an interlocutory appeal of the District Court's suppression order, and the Sixth Circuit Court of Appeals affirmed the suppression on April 9, 1996. See U.S. v. Shamaeizadeh, 80 F.3d 1131 (6th Cir. 1996). Thereafter, the criminal charges against Respondent were dismissed on motion of the government. App., *infra*, 5a, 21a.

Procedural Nature of This Case. Respondent filed this civil action on April 8, 1997. App., *infra*, 5a. Respondent brought suit pursuant to 42 U.S.C. §1983 seeking monetary damages for an illegal search and seizure and wrongful arrest. Respondent also alleged state law claims of malicious prosecution, intentional infliction of emotional distress and abuse of process.

On March 2, 1998, upon motion of the Petitioners, the District Court dismissed with prejudice Respondent's §1983 claims based on illegal search and seizure and wrongful arrest as barred by Kentucky's one-year, personal injury statute of limitations. App., *infra*, 19a-27a. The District Court also dismissed without prejudice Respondent's state law claims of malicious prosecution, abuse of process and intentional infliction of emotional distress, declining to exercise pendent jurisdiction over same.

Respondent then timely filed a Notice of Appeal on March 26, 1998, to the Sixth Circuit Court of Appeals. Respondent only raised in his appeal the District Court's dismissal of his §1983 claim for illegal search and seizure. The Sixth Circuit reversed the District Court's dismissal of that claim, and held that Respondent's cause of action for the illegal search and seizure did not accrue until his criminal prosecution was dismissed by the United States. The Sixth Circuit concluded that since this action was filed within one year of that accrual, Respondent's claim was not time-barred. App., *infra*, 11a-18a.

REASONS FOR GRANTING THE PETITION

Introduction and Summary of Argument. Phrased in the terminology of Heck v. Humphrey, 512 U.S. 477 (1994), the two questions presented in this case are: (1) in what circumstances do "the two most fertile sources of federal-court prisoner litigation--the Civil Rights Act of 1871, 42 U.S.C. §1983, and the federal habeas corpus statute, 28 U.S.C. §2254"-- "intersect" with each other; and (2), assuming this case "lies at the intersection" of those two statutes "which should yield to the other at this intersection." Id. at 480, 490 & 491 (Scalia, J., majority opinion) (Thomas, J., concurring) (Souter, J., concurring). The courts below answered these questions differently. The District Court dismissed Respondent's §1983 claim as time-barred because Heck was

deemed inapplicable. The Sixth Circuit Court of Appeals, however, resurrected Respondent's claim, treated it as if it crossed that "intersection," and held that the normal rules of accrual under §1983 must "yield" to the delayed-accrual rule of Heck.

The Sixth Circuit below erred in applying Heck to this case. Respondent was never convicted or incarcerated and never had habeas corpus remedies available to him. Therefore, Respondent's unlawful search and seizure claim never traversed the "intersection" of §1983 and habeas corpus, 28 U.S.C. §2254. Even if Heck does govern this case, however, the Sixth Circuit erred in causing the normal rules of accrual to "yield" to the delayed-accrual rule of Heck. Fourth Amendment search and seizure claims should be excepted from Heck's delayed-accrual rule--as revealed in footnote 7 of the Heck decision--because of doctrines like independent source, inevitable discovery and harmless error. The Seventh Circuit Court of Appeals (joined by three other circuits) has repeatedly so held in a direct conflict with the Sixth Circuit Court of Appeals (joined by two other circuits). This conflict should be reviewed and resolved with adoption of the Seventh Circuit position.

The Heck Decision. Heck begins its discussion of the "intersection" of §1983 and federal habeas statutes with an analysis of this Court's initial brush with the "overlap between these two provisions" in Preiser v. Rodriguez, 411 U.S. 475 (1973). See Heck, 512 U.S. at 481. In both Preiser and Heck, this Court was confronted with a state prisoner's attempt to bring a §1983 claim when the prisoner had not exhausted available habeas corpus remedies. In Preiser, this Court "held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement...even though [his] claim may come within the literal terms of §1983." Id. In Heck, this Court held that a prisoner who sues to recover

for §1983 damages "caused by actions whose unlawfulness would render [his] conviction or sentence invalid...must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal...or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 486-87.

Heck establishes a "favorable termination" requirement based on an analogy to the common-law malicious prosecution action. The rationale for this requirement is to "avoi[d] parallel litigation over the issues of probable cause and guilt. . .and [to] preclud[e] the possibility of two conflicting resolutions arising out of the same or identical transaction." Id. (citations omitted). The Heck rationale turns on whether a §1983 cause of action *exists* at all, and as a result, most courts and commentators view Heck as a rule of delayed accrual of limitations *until* (and unless) any underlying criminal action has been "favorably" concluded. See, e.g., cases collected in 2 S. Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983 §9:30 & 9:58-59 (1998) (Heck held that a §1983 damages action attacking the validity of a conviction "does not accrue *unless and until* that conviction is reversed, expunged or otherwise declared invalid" (italics added) (hereafter "S. Nahmod, The Law of Section 1983").

I. HECK IS SUBJECT TO VARYING INTERPRETATIONS AND HAS BEEN INCONSISTENTLY APPLIED IN THE LOWER COURTS.

Heck's holding can be interpreted in two ways, and as a result, lower courts have applied it inconsistently. On one hand, Heck can be read broadly to establish a new favorable-termination element for all §1983 claims that amount to civil attacks on criminal proceedings. On the other hand, it can be read narrowly, in accordance with its facts, to require a

favorable termination only for convicted prisoners currently held in state custody. See Heck, 512 U.S. at 499-500 (Souter, J., concurring) (discussing the two ways that the Heck majority opinion can be read and concluding Heck should only apply to a convicted prisoner "caught at the intersection of §1983 and the habeas statute [28 U.S.C. §2254]").

The Broad View of Heck. Because the Heck majority opinion relies upon judicial policy of avoiding potentially conflicting criminal and civil actions, several courts have applied Heck broadly to delay the accrual of a §1983 claim even when there has not been an actual conviction or confinement of the plaintiff, but merely a *pending* prosecution or *potential* for *future conviction*. See, e.g., Covington v. City of New York, 171 F.3d 117, 124 (2d Cir. 1999), petition for cert. filed; Smith v. Holtz, 87 F.3d 108, 112-13 (3d Cir. 1996); Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996). The Sixth Circuit Court of Appeals' opinion below is a perfect example of this broad interpretation. Respondent was never tried or convicted, nor held in state custody, yet the Sixth Circuit applied Heck's favorable termination rule to delay the accrual of his civil claim during the pendency of his criminal case, thereby saving his civil claim from being barred by limitations.[1]

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[1] Some courts have extended the Heck holding to bar not just *state* prisoner's civil rights claims attacking state defendant-officials' actions giving rise to the prisoner's confinement, but also to bar *federal* prisoners' damages claims under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). See, e.g., Robinson v. Jones, 142 F.3d 905, 907 (6th Cir. 1998) (the "Heck holding applies equally to an action brought under Bivens"); Crow v. Penry, 102 F.3d 1086, 1087 (10th Cir. 1996) (same); Abella v. Rubino, 63 F.3d 1063, 1065 (11th Cir. 1995) (same). These decisions applying Heck to federal prisoners extend its rationale beyond the intersection of

The Narrower View of Heck. Not all courts construe Heck so broadly. A narrower interpretation, espoused in Justice Souter's concurring opinion in Heck, limits the holding to its specific facts, to wit: a *convicted prisoner* being held in *state custody* attacking the validity of his *conviction* in a *civil* rights action *without exhausting available habeas* remedies.

The rationale for this narrower view is that "allowing a state prisoner to proceed directly with a federal-court §1983 attack on his conviction or sentence 'would wholly frustrate explicit congressional intent' as declared in the habeas exhaustion requirement." Heck, 512 U.S. at 498 (Souter, J., concurring). The Heck holding "can be read as saying nothing more than that...after enactment of the habeas statute... , prison inmates seeking §1983 damages in federal court for unconstitutional conviction...must satisfy a requirement analogous to the malicious-prosecution tort's favorable-termination requirement." Heck, 512 U.S. at 500 (Souter, J., concurring). This is the "sensible way to read the [Heck majority] opinion...because the alternative would needlessly place at risk the rights of those outside the intersection of §1983 and the habeas statute, individuals not 'in custody' for habeas purposes." Id. Thus, the Heck majority is correct "not because the favorable termination requirement [is] necessarily an element of the §1983 cause of action for unconstitutional

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§1983 and 28 U.S.C. §2254. The latter statute was specifically amended by Congress in 1948 to "requir[e] exhaustion of adequate *state* remedies as a condition precedent to the invocation of federal judicial relief." Preiser, 411 U.S. at 489 (italics added). This amendment requiring exhaustion for *state* habeas corpus proceedings "is rooted in considerations of federal-state comity...[a] principle ...defined in Younger v. Harris, 401 U.S. 37, 44 (1971), as 'a proper respect for state functions.'" Preiser, 411 U.S. at 491.

conviction or custody, but because it [is] a 'simple way to avoid collisions at the intersection of habeas and §1983.'" Spencer v. Kemna, 523 U.S. 1, __ (1998) (Souter, J., concurring).

Several lower courts (including at least one state appellate court) have adopted this narrower view of Heck, and they have done so for essentially the same reasons set forth in Justice Souter's concurrence in Heck.[2] See, e.g., Chatman v. Slagle, 107 F.3d 380, 382 (6th Cir. 1997) (Heck does not apply "[w]here there has been no state [court] trial" or conviction of the §1983 plaintiff); Reed v. City of Chicago, 867 F. Supp. 714, 717 (N.D. Ill. 1994) ("[s]ince the [§1983] Plaintiff. . .has neither been convicted nor sentenced, the Supreme Court's opinion in Heck is inapplicable"), aff'd 77 F.3d 1049, 1051 (7th Cir. 1996) (affirming dismissal of wrongful arrest claim as "timebarred"); Fondren v. Klickitat County, 905 P.2d 928, 933 (Wash. Ct. App. 1995) (expressly applying Justice Souter's concurrence in Heck, and holding that "Heck does not apply" where the §1983 plaintiff "is not incarcerated and therefore is not subject to the federal habeas corpus exhaustion requirement"). Indeed, the District Court below followed this narrower view of Heck when it held that Sixth Circuit precedent established in Chatman, 107 F.3d at 382, required dismissal of Respondent's claim as time-barred. App., *infra*, 23a-24a.

The Conflicting Decisions That Flow From Heck. The decisions that narrowly interpret Heck conflict with those that interpret Heck broadly, and this conflict has grown worse since

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[2] This narrow view of the rule in Heck is supported in pre-Heck case law with decisions prescient of, but consistent with, Heck's later holding. See, e.g., Duncan v. Gunter, 15 F.3d 989, 991 (10th Cir. 1994) (commenting that a prisoner may not use a §1983 damages claim to avoid habeas exhaustion requirements if deciding his claim would also decide the validity of his confinement).

this Court's recent decision in Spencer v. Kemna, 523 U.S. 1 (1998). Several courts have recognized that in Spencer, five Justices of this Court indicated agreement with Justice Souter's concurrence in Heck, thus forming an apparent majority consensus in favor of the narrower view of Heck. See, e.g., Jenkins v. Haubert, 179 F.3d 19, 27 (2d Cir. 1999); Fox v. Van Oosterum, 176 F.3d 342 (6th Cir. 1999); Carr v. O'Leary, 167 F.3d 1124, 1127 (7th Cir. 1999) (Posner, C.J.); Cabrera v. City of Huntington Park, 159 F.3d 374, 380 n.6 (9th Cir. 1998); Nance v. Vieregge, 147 F.3d 589, 591 (7th Cir. 1998) (Easterbrook, J.); Figueroa v. Rivera, 147 F.3d 77, 81 & n.3 (1st Cir. 1998); Sylvester v. Hanks, 140 F.3d 713, 714 (7th Cir. 1998); Johnson v. Freeburn, 29 F. Supp.2d 764 (E.D. Mich. 1998).

Because of Spencer, many courts are actively struggling with how broad or narrow to apply Heck, resulting in both intra-circuit and inter-circuit inconsistencies in Heck's application. For example, the Second Circuit recently held, in reliance upon Spencer, that the favorable termination requirement of Heck applies only to §1983 plaintiffs who have the *availability* of habeas corpus review. Jenkins, 179 F.3d at 27 (five Justices in Spencer have pronounced "that some federal remedy--either habeas corpus or §1983--must be available" before Heck will apply). Without apparently recognizing any inconsistency in positions, however, the Second Circuit recently applied Heck in Covington v. City of New York, 171 F.3d 117 (2d Cir. 1999), so as to delay the accrual of a plaintiff's §1983 claim during the pendency of his criminal prosecution. Like the Respondent in this case, Covington was never convicted or incarcerated; thus, he never had a habeas corpus remedy available. Yet, the Second Circuit panel in Covington, in contravention of its sister panel in Jenkins, applied Heck to delay the accrual of his claim.

Consistent with the Second Circuit's Jenkins decision have been several rulings in the Seventh Circuit Court of Appeals. For example, in Carr v. O'Leary, 167 F.3d 1124 (7th Cir. 1999), Chief Judge Posner opined that "dictum in Spencer v. Kemna casts sufficient doubt on the applicability of Heck to the present case to make it unreasonable to relieve the defendants from their waiver of Heck." Id. at 1127. In Carr, the plaintiff, formerly a prison inmate, was innocently "caught in a prison riot," and lost six months' good-time credit as disciplinary sanction. Id. at 1125. The plaintiff brought a §1983 challenge to his disciplinary proceedings, but the defendants failed to raise Heck as a defense.

In refusing to relieve defendants of their waiver of the Heck defense, Chief Judge Posner pointed out that the favorable termination rule in Heck was not an obstacle to the plaintiff's suit because "a majority of the Justices of the Supreme Court [in Spencer] have said that a prisoner who cannot challenge the validity of his conviction (or...prison disciplinary sanction) by either appeal or post-conviction procedure can do so by bringing a civil rights suit for damages under 42 U.S.C. §1983." Id. at 1127. Since the plaintiff "was released from prison after the suit was filed, he could no longer bring a habeas corpus proceeding." Id. "With Carr unable to get the disciplinary sanction reversed [through habeas], five Justices would not consider the sanction a bar to a §1983 suit even though that suit calls into question the validity of the sanction." Id.

The concurrence in Carr avoided waiver as its rationale and relied squarely on the five-Justice majority in Spencer to treat Heck as inapplicable since habeas review was impossible for the plaintiff. See id. at 1129 (Ripple, J., concurring); accord Nance, 147 F.3d at 591 (Easterbrook, J.) ("five Justices concluded in [Spencer] that the approach of Heck does not govern when other relief is impossible"); Sylvester, 140 F.3d at 714

(Easterbrook, J.) (citing Spencer for the proposition that "Souter, J., concurring Ginsburg, J., concurring, and Stevens, J., dissenting, for[m] a majority that would treat Heck as inapplicable when collateral review is impossible").

In contrast, other circuit courts of appeals have refused to allow Spencer to alter their broad applications of Heck. The First Circuit recently observed that Spencer "may cast doubt upon the universality of Heck's 'favorable termination' requirement," but held that "even if th[e Heck] precedent appears weakened by pronouncements in [the Supreme Court's] subsequent decisions," the lower federal courts are "admonished...to follow its directly applicable precedent." Figueroa v. Rivera, 147 F.3d 77, 81 & n.3 (1st Cir. 1998).

In Figueroa, the First Circuit applied Heck to bar the family members of a deceased inmate from bringing a §1983 claim that in essence attacked the inmate's conviction. The inmate had earlier sought habeas corpus, but died while his habeas action was still pending. The plaintiff family members argued "that strict application of Heck works a fundamental unfairness" because the inmate was "attempting to impugn his conviction when death intervened." Figuero, 147 F.3d at 80-81. While the First Circuit sympathized with this argument, saying it "strikes a responsive chord," the Court felt "admonished" to adhere to "Heck's core holding: that annulment of the underlying conviction is an element of a section 1983 'unconstitutional conviction' claim." Id. at 81 n.3 (the Supreme Court reserves to itself "the prerogative of overruling its own decisions").

Consistent with the First Circuit's Figueroa decision is the Ninth Circuit Court of Appeals' decision in Cabrera v City of Huntington Park, 159 F.3d 374, 380 n.6 (9th Cir. 1998). In Cabrera, the Ninth Circuit recognized that after Spencer "it is questionable whether Heck's holding would command a majority of the Supreme Court," but nonetheless stated "Heck

remains good law." Id. It appears the First and Ninth Circuits still follow a broad application of Heck, notwithstanding the concurring and dissenting opinions in Spencer.

It is thus apparent that the Second and Seventh Circuit decisions are contrary to the First and Ninth Circuit decisions. This rift in the circuits exists because the former are applying Justice Souter's narrower rationale for the Heck holding, while the latter are continuing to apply Heck broadly unless and until this Court expressly clarifies Heck's *in*applicability to "individuals not 'in custody' for habeas purposes" and thus "outside the intersection of §1983 and the habeas statute." Heck, 512 U.S. at 500 (Souter, J., concurring).

The Sixth Circuit decision below applies Heck broadly even in the face of Spencer, and its broad approach is contrary to that of the Second and Seventh Circuit decisions. Indeed, the decision below contradicts intra-circuit precedent that narrowly construes Heck. See Chatman v. Slagle, 107 F.3d at 380. The District Court below squarely relied on this precedent to apply Heck narrowly in accordance with Justice Souter's view. Distinguishing Heck as inapplicable to this case, the District Court states: "Heck [concern]s a prisoner's ability to 'circumvent the procedural hurdles of modern habeas corpus law by using §1983 to bring what is essentially a habeas petition.'" App., *infra*, 23a, quoting Chatman, 107 F.3d at 382. The District Court then holds "where there has been no trial, and hence, no conviction or sentence, Heck does not apply." App., *infra*, 23a.

The Sixth Circuit's opinion below observes in a footnote that five Justices in Spencer have "indicated that Heck's favorable termination requirement should no longer apply after a plaintiff ha[s] served [his] term of imprisonment," and recognizes that, as a result of Spencer, a portion of another Sixth Circuit

precedent, Schilling v. White, 58 F.3d 1081 (6th Cir. 1995), has been "call[ed]...into doubt." App., *infra*, 11a n.3. Incredibly, however, the Sixth Circuit ignores the trial court's reliance upon Chatman and that precedent's narrow reading of Heck. In a terse footnote, the Sixth Circuit merely distinguishes Chatman as irrelevant to the issue of when Respondent's §1983 claim accrued. App., *infra*, 16a n.7.

Confusion And Uncertainty Created As To Limitations. It is clear the Heck decision has created a great deal of confusion. Litigation is needlessly fueled in both state and federal courts by such confusion and uncertainty. See, e.g., Day v. Zubel, 922 P.2d 536 (Nev. 1996) (a legal malpractice case stemming from a lawyer's incorrect prediction as to when limitations commenced and expired due to uncertainty in application of Heck's delayed-accrual rule). This Court has previously observed with respect to §1983 claims: "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Wilson v. Garcia, 471 U.S. 261, 266 (1985). The Nevada Supreme Court's Day case exemplifies why this observation is so correct.

Although Wilson settled the issue of what state-law period of limitations governs §1983 claims, federal law governs the *accrual* of §1983 claims. See, e.g., Covington, 171 F.3d at 121; Gonzales v. Entress, 133 F.3d 551, 554 (7th Cir. 1998). Pursuant to federal accrual law, civil rights claims are ordinarily deemed to accrue when the conduct or action giving rise to the claim occurred. See, e.g., Delaware State College v. Ricks, 449 U.S. 250, 259 & 261 (1980) (in civil rights action attacking the denial of tenure, this Court held "limitations periods normally commence when the employer's [challenged] decision is made"); see generally 2 S. Nahmod, The Law of Section 1983 §9:10-12. Prior to Heck, the circuit courts of appeals uniformly applied this rule of accrual, phrasing it in terms of the plaintiff's

discovery of injury, to wit: §1983 claims accrue when the plaintiff knew or had reason to know he was injured by the defendant's unconstitutional conduct. See App., *infra*, 6a, and cases cited therein. This simple rule of accrual is logical, predictable, and certain in application.

After Heck, as the Sixth Circuit aptly observed below, "the resolution of this [accrual] issue is more *complicated*." App., *infra*, 6a (italics added). As applied below, Heck implicates the accrual of limitations in *all* cases involving plaintiffs who are either charged with, or convicted of, a criminal offense unless the plaintiff's claim does not "*necessarily* require...[proof of] the unlawfulness of his conviction" or pending prosecution. Heck, 512 U.S. at 486 (italics added). Determining whether a claim "necessarily" implicates a conviction or pending prosecution is no easy endeavor. Footnote 7 of Heck provides some guidance, but there is a direct conflict in the circuits as to how to interpret this footnote. See Discussion Pt. II, *infra*, 17-30.

"[C]onflict, confusion, and uncertainty concerning... limitations" have unfortunately, therefore, crept back into law of §1983 notwithstanding Wilson's valiant attempt to bring certainty to "this most important, and ubiquitous civil rights statute." Wilson, 471 U.S. at 266. The existence of such conflict, confusion and uncertainty provided this Court "compelling reasons for granting certiorari" in Wilson, and should do so again in this case. Id.

This Court needs to clarify the proper scope and continuing validity of the original Heck majority rationale. Lower courts have noted the various opinions in Spencer and that Justice Souter's concurring opinion may have emerged as the controlling rationale. Clarification of how broad to apply Heck's holding is, therefore, of the utmost national importance because of Heck's impact upon the proper calculation of the

accrual of limitations. Since Respondent was never charged with a crime in state court, taken into custody by state officials, nor convicted in federal district court, he has never had available to him habeas corpus remedies. Consequently, the Sixth Circuit below should never have applied Heck's delayed-accrual rule to save his claim from being time-barred.

II. THE CIRCUIT COURTS OF APPEALS ARE IN DIRECT CONFLICT OVER APPLICATION OF HECK'S ACCRUAL RULE IN §1983 CLAIMS INVOLVING FOURTH AMENDMENT ALLEGATIONS OF UNLAWFUL SEARCH AND SEIZURE.

Even if this Court believes this case is governed by Heck--in spite of the fact that Respondent never had habeas remedies available to him--the Sixth Circuit Court of Appeals' decision should be reviewed and reversed because it erroneously causes the normal rules of accrual for Fourth Amendment search and seizure claims to "yield" to Heck's delayed-accrual rule. Pursuant to footnote 7 of the Heck decision, Respondent's claim should have been excepted from Heck in accordance with a long line of authority from the Seventh Circuit Court of Appeals (joined by the Eighth, Ninth and Eleventh Circuits). Since success on a Fourth Amendment claim does not *necessarily* implicate a criminal conviction, Heck footnote 7 teaches that the delayed-accrual rule does not apply to this case.

Heck's Footnote 7. This Court wrote in Heck, "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." Heck, 512 U.S. at 487 (italics in original). In footnoting this point, this Court wrote that:

> [f]or example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery,...and especially harmless error,...such a §1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

Id. 512 U.S. at 487 n.7 (citations omitted).

As the Court below observes, this Heck footnote has been "interpreted in two different ways." App., *infra*, 8a. The Sixth Circuit reads it as "clearly rejecting the conclusion that a general exception to the requirement that a conviction be set aside exists for Fourth Amendment claims under §1983." App., *infra*, 10a. The Seventh Circuit Court of Appeals, however, reads it as creating just such an exception. See, e.g., Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (stating "Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so *in all cases* these claims can go forward") (italics added).

The Seventh Circuit Court of Appeals' Application of Heck Footnote 7. The Seventh Circuit Court of Appeals has interpreted Heck in a brightline "general exception" fashion, holding that in *all* Fourth Amendment claims of unlawful search or arrest, Heck has no application. See, e.g., Copus, 151 F.3d at 648; Kelley v. Myler, 149 F.3d 641, 645 (7th Cir. 1998); Sneed v. Rybicki, 146 F.3d 478, 481 (7th Cir. 1998); Gonzalez v. Entress, 133 F.3d 551, 553-54 (7th Cir. 1998); Washington v. Summerville, 127 F.3d 552, 555-56 (7th Cir. 1997); Booker

v. Ward, 94 F.3d 1052, 1056-57 (7th Cir. 1996); Simpson v. Rowan, 73 F.3d 134, 136 (7th Cir. 1995).

The Seventh Circuit first articulated its approach in April 1995 shortly after Heck. See Perez v. Sifel, 57 F.3d 503 (7th Cir. 1995) (holding "claims relating to an illegal search and improper arrest may not be [Heck-]barred, as neither claim would necessarily undermine the validity of the conviction"). Later that same year, the Seventh Circuit noted a difference in opinion with the Sixth Circuit's precedent of Schilling v. White, 58 F.3d 1081 (6th Cir. 1995). See Simpson, 73 F.3d at 136 (holding illegal search and arrest claims are not barred by Heck and citing several circuit courts of appeals' opinions as authority for this proposition but noting in a "but cf." citation that the Sixth Circuit's Schilling decision does not support this holding).

In Gonzalez, supra, Judge Easterbrook thoroughly explains the Seventh Circuit's approach to Fourth Amendment claims, expressly recognizing the conflict with the Sixth Circuit's decision in Schilling, but nevertheless continuing to interpret Heck's footnote 7 to mean "a claim based on an unlawful search or arrest may be brought immediately[] because a violation of the fourth amendment does not necessarily impugn the validity of a conviction." Gonzalez, 133 F.3d at 553. The holding in Gonzalez not only conflicts with Schilling, but squarely conflicts with the holding of the Sixth Circuit in this case.

Like Respondent, Gonzalez filed suit after obtaining a favorable termination on criminal charges. His civil claim sought damages for an alleged unconstitutional search and arrest. Gonzalez did not commence his suit until well beyond the expiration of limitations calculated from the date of the search and arrest. He argued that limitations did not expire, however, because his cause of action never accrued under Heck until his acquittal. Rejecting his argument, the Seventh Circuit held that Heck "has no effect on wrongs that do not

demonstrate the invalidity of a conviction (or other judicial order)." Id. In holding Gonzalez's claim time-barred, the Court stated "a claim asserting a violation of the fourth amendment necessarily 'accrues' at the time of the unlawful search or seizure, as we have held several times." Id.

The rationale Judge Easterbrook offers in Gonzalez is "that a search can be unlawful but the conviction entirely proper, or the reverse, and that *some injury* from a violation of the fourth amendment is unrelated to the conviction." Id. at 554 (italics added). Since some injury can be traced to an illegal search or seizure, separate and apart from any other injury that may be caused by a conviction based on illegally obtained evidence, the Seventh Circuit deems Fourth Amendment illegal search claims to accrue at the time the search occurred. "[T]he exclusionary rule [in criminal cases] is used only for a *subset* of [Fourth Amendment] violations; damages [under §1983] are available for all." Id. (italics added). Judge Easterbrook disagrees with the Sixth Circuit's decision in Schilling because it incorrectly "implies that if wrongfully seized evidence is not excluded at [the criminal] trial, there can be no damages remedy." Id.

In the Seventh Circuit's more recent decision of Kelley, supra, the Seventh Circuit summarizes its rationale as follows:

> [i]n commenting on Heck in Gonzalez, we noted two things: first, that "a claim based on an unlawful search or arrest may be brought immediately, because a violation of the fourth amendment does not necessarily impugn the validity of a conviction--the evidence may be properly admitted anyway, or it may be excluded and the defendant convicted on other evidence" and second, that a "claim of damages based on 'the "injury" of being convicted' is impermissible until the conviction has been

> overturned." We observed that "[a]ll Heck does is knock out one element of damages, the injury from wrongful conviction, while the conviction stands." Thus we concluded that because a claim asserting a violation of the fourth amendment does not "necessarily demonstrate[] the invalidity of [a] conviction," such a claim accrues at the time of the unlawful search or seizure.

Kelley, 149 F.3d at 645 (citations omitted).

The Eighth, Ninth and Eleventh Circuit Courts of Appeals' Application of Heck Footnote 7. Although not characterizing its approach as a general exception to Heck, the Eighth Circuit Court of Appeals, in Simmons v. O'Brien, 77 F.3d 1093 (8th Cir. 1996), applied what amounts to an exception for Fifth Amendment violations concerning the voluntariness of confessions. The Simmons Court held Simmons' Fifth Amendment claims accrued at the time of the alleged violations, and that accrual of his claims was not dependent upon the favorable outcome of his criminal charges. Applying Heck's footnote 7, the Court stated: "harmless error analysis is applicable to the admission at trial of coerced confessions, [and therefore] judgment in favor of Simmons on this §1983 action challenging his confession will not necessarily demonstrate the invalidity of his conviction." Id. at 1095. Similar to the Seventh Circuit, therefore, the Eighth Circuit seems to follow a general exception approach to the accrual of claims based on Fifth Amendment violations.

Similar also to the Seventh Circuit approach is the Eleventh Circuit Court of Appeals decision, Datz v. Kilgore, 51 F.3d 252 (11th Cir. 1995). The Sixth Circuit's opinion below quotes Datz as "holding that Heck 'is no bar to Datz' civil action because, even if the pertinent search did violate the Federal Constitution,

Datz' conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error.'" App., *infra*, 9a, quoting Datz, 51 F.3d at 253 n.1.

Although not cited by Sixth Circuit below, the Ninth Circuit Court of Appeals has similarly applied Heck's footnote 7 in an illegal search case. In Trimble v. City of Santa Rosa, 49 F.3d 583 (9th Cir. 1995), the Ninth Circuit held a prisoner's Fourth Amendment search claim barred by Heck because "Trimble failed to allege any injury *other* than his conviction and sentence." Id. (italics added). The Court did not grant Trimble leave to amend to plead injury other than his conviction because any Fourth Amendment claim Trimble might have properly pleaded to avoid the Heck bar was already time-barred. Id.

The Ninth Circuit's Trimble decision appears to agree with the approach of the Seventh Circuit. Unlike the Sixth Circuit, Trimble recognizes that a Fourth Amendment search claim can be founded upon compensable injury, separate and apart from any conviction. Since some injury (other than conviction) is separately compensable for an illegal search, the time for accrual of any claim for such injury is not delayed under Heck. See id.

The Sixth Circuit Court of Appeals' Application of Heck Footnote 7. The Sixth Circuit Court of Appeals' decision in Schilling v. White, 58 F.3d 1081 (6th Cir. 1995), relied upon in the opinion below, reaches an opposite conclusion from the Seventh Circuit. Indeed, the Schilling decision expressly rejects the Seventh Circuit view that Heck's footnote 7 establishes an exception for Fourth Amendment violations.

In Schilling, the plaintiff filed his civil suit seeking damages for an alleged unconstitutional search of his automobile. The search occurred incident to a car accident investigation which resulted in Schilling's arrest for driving under the influence of drugs ("DUI"). Schilling pleaded guilty to the DUI charge so

the district court dismissed his §1983 complaint since he was unable to establish the invalidity of his conviction. Affirming the dismissal, the Sixth Circuit considered "whether [a] Fourth Amendment exception...survives the Supreme Court's recent decision in Heck." Schilling, 58 F.3d at 1085. In concluding that no such exception survives, the Schilling Court relies upon Heck's footnote 7 as "plainly refut[ing] the argument that Fourth Amendment claims are exempted from the requirement that a conviction must be set aside as a precondition for this type of §1983 suit." Id. at 1086.

Recognizing that its conclusion directly contradicted Seventh Circuit precedent, the Schilling Court states: "[t]he Seventh Circuit *misreads* Heck." Id. (italics added). The Sixth Circuit reasons that because a Fourth Amendment violation does not *cause* an illegal conviction, the §1983 plaintiff must show his conviction to be invalid before he can support *any* claim of compensable, constitutional injury. Id. Construing Heck's line of reasoning, the Schilling Court states: "because an illegal seizure does not automatically render a conviction invalid, an illegal seizure does not *alone* create a injury compensable under §1983." Id. (italics added). While the Seventh Circuit holds there exists compensable injury from a Fourth Amendment violation alone, separate and apart from any conviction, Schilling holds there can be *no* compensable injury for a Fourth Amendment violation alone. Compare Gonzalez, 133 F.3d at 554 with Schilling, 58 F.3d at 1086.

After canvassing opinions from a number of circuit courts of appeals including the Seventh Circuit, the Sixth Circuit's decision below again declines to follow the Seventh Circuit's approach. The Sixth Circuit follows Schilling as precedent, and clarifies how that decision should be read. Citing to Braxton v. Scott, 905 F. Supp. 455, 458 (N.D. Ohio 1995), a district court opinion that tries to reconcile Schilling with Heck to determine

the most "plausible reading of Schilling," the Court below states that Schilling requires district courts in Fourth Amendment cases to conduct an "independent review" to determine whether success in the civil action would undermine the plaintiff's criminal conviction or potential future conviction if there are pending criminal charges. App., *infra*, 8a-10a. If so, then no cause of action exists, and accrual of the §1983 claim does not occur until favorable termination of the criminal charges. Id.

As part of the "independent review" conducted in the instant case, the Court below analyzes the relief Respondent seeks and the evidence likely to have been introduced against him in his pending criminal proceeding to determine whether his having brought a civil damages suit for the unlawful search would have effectively undermined the validity of any potential future conviction. Conducting this analysis, the Court observes that Respondent seeks damages "based on the alleged illegal seizure of property," as well as litigation expenses incurred in defending against his criminal charges, lost wages/future earnings, medical expenses, and "pain, embarrassment, and humiliation." App., *infra*, 12a, 15a. The Court then examines the evidence that would have been introduced against him in his criminal trial and assumes (with no basis) that the only evidence the government would likely have introduced "was evidence discovered in [his] house during the allegedly illegal search." App., *infra*, 16a. In light of his alleged injuries and the expected evidence, the Court holds that Respondent's §1983 claim would have, if successful, amounted to an attack on his potential future conviction. Therefore, his claim did not accrue until his criminal charges were dismissed. App., *infra*, 16a-17a.

The Second and Fifth Circuit Courts of Appeals' Application of Heck Footnote 7. Similar to the "independent review" approach taken by the Sixth Circuit in this case is the Second Circuit Court of Appeals' split-panel decision in

Covington v. City of New York, 171 F.3d 117 (2d Cir. 1999), cert. petition filed. In Covington, the plaintiff brought a §1983 claim alleging an unconstitutional false arrest after criminal charges were dismissed against him. Id. at 119. Covington's criminal charges were dismissed because the prosecutor failed to timely bring his case to trial. Id. at 120. Although Covington does not involve an illegal search claim, the issues before the Second Circuit, as in this case, concern when the plaintiff's §1983 claim accrued and whether the plaintiff's claim was timely filed within applicable limitations.[3] Id. at 119.

The Second Circuit held that the determining factor as to when Covington's cause of action accrued depended upon whether "a judgment in Covington's favor on the false arrest claim would have undermined the validity of any potential conviction in the criminal proceedings against him." Id. The Second Circuit concluded that such a determination could not be made based upon the record before the court and remanded to the district court to conduct what amounts to an "independent review," similar to the approach adopted in the Sixth Circuit's decision below. Id. at 119-20.

In a well-reasoned dissent in Covington, Judge Glasser raises concerns about both the majority's misapplication of Heck and the enormous practical burdens placed upon trial courts by the Covington ruling. Id. at 125-28 (Glasser, J., dissenting). Citing the Seventh Circuit's approach, Judge Glasser emphasizes that a claim for damages based upon false arrest does not necessarily impugn the validity of a conviction. Examples provided by

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[3] While Covington's facts concern an unlawful arrest, an earlier Second Circuit decision deals with an illegal search. See Woods v. Candela, 47 F.3d 545 (2d Cir. 1995). Based on Covington's interpretation of Woods, however, it is reasonable to assume the Second Circuit would apply the "independent review" approach for unlawful search cases.

Judge Glasser as to an arrest without seizure of evidence but a subsequent conviction follow Judge Easterbrook's opinion in the Seventh Circuit's Gonzalez decision. Compare Gonzalez, 133 F. at 554 with Covington, 171 F.3d at 125-26 (Glasser, J., dissenting). Judge Glasser also raises an interesting hypothetical about evidence being illegally seized but never used by the prosecutor. He concludes that any §1983 claim would have to be immediately actionable as the pending conviction could never be impugned. Covington, 171 F.3d at 126. Judge Glasser's reasoning is consistent with the Seventh's Circuit's reasoning and a proper interpretation of this Court's footnote 7 in Heck.

Judge Glasser offers a most insightful summation of the proper application of Heck when he writes "[i]t is only when the conviction and imprisonment are themselves constitutional wrongs, that Heck postpones the accrual of the claim until the conviction has been set aside." Id. In addition, Judge Glasser notes the extremely burdensome task placed upon district courts by the majority opinion's remand for "independent review":

> the majority...place[s] upon the district court an impossible and totally unrealistic burden. It would require that court to determine and assess the strength of all the evidence available to the state, to determine whether a motion to suppress evidence or statements based upon an alleged unlawful arrest or a claimed unreasonable search should be denied because any one or more of many exceptions would permit the evidence to be received, e.g., that the evidence seized was in plain view; would have been inevitably discovered; was obtained during an inventory search; was subject to a good faith exception; was seized under exigent circumstances; when the statement was made the interrogation was no longer custodial; or

> whether the state had evidence entirely independent of an arrest or search that would have been enough to obtain a conviction such as the testimony of an eyewitness or informant.

Id. at 128 (Glasser, J., dissenting).

The Fifth Circuit Court of Appeals follows a similar "independent review" approach. See Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995); accord Hudson v. Hughes, 98 F.3d 868 (5th Cir. 1996) (holding an inmate's claim Heck-barred after analyzing the likelihood certain evidence would be introduced in his criminal case). In Mackey, the plaintiff brought an unreasonable search and seizure claim which the district court treated as an attack on his arrest. Id. at 745-46. Recognizing that "[t]here is nothing necessarily inconsistent between the arrest being illegal and [the] conviction being proper"(as the Seventh Circuit has repeatedly held), the Fifth Circuit did not believe the record before it adequately reflected whether Mackey's claim, if successful, would implicate the validity of his conviction and accordingly remanded for further development of the record. In so doing, the Court held:

> If Mackey is tried and convicted and in his contested criminal case no evidence is presented resulting...from any of his arrests, it is difficult to see how any illegality in any of his arrests could be inconsistent with his conviction. On the other hand, if he is convicted and evidence is presented...which is a...product of...his arrests, then his §1983 damage claims challenging the validity of his arrests would appear to undermine...his conviction and hence be barred by Heck.

Id. at 746. The Mackey Court reversed the lower court's dismissal and suggested upon remand that the action should be

stayed "until the pending criminal case has run its course, as until that time it may be difficult to determine the relation, if any, between the [criminal case and the §1983 action]." Id.

While this Fifth Circuit approach appears consistent with the Sixth and Second Circuits' application of the Heck footnote, it is interesting that Mackey's concluding remark, concerning the difficulty in determining the relation between pending criminal charges and §1983 claims, confirms what Judge Glasser points out in his dissent in Covington, 171 F.3d at 128--i.e., that very practical and burdensome problems are bound to arise in the district courts in conducting the so-called "independent review."

Other Circuit Courts of Appeals' Application of Heck Footnote 7. Other circuit courts of appeals have discussed how Heck's footnote 7 should be interpreted in the unlawful search and seizure context. E.g., Crow v. Penry, 102 F.3d 1086 (10th Cir. 1996) (dismissing as Heck-barred a federal inmate's claim that his probation officer unlawfully obtained search and arrest warrants). This succinct Tenth Circuit Court of Appeals case does not, however, provide any detailed analysis of how Heck's footnote 7 should be applied.[4]

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[4] Numerous circuit decisions have applied Heck in contexts addressing constitutional violations other than illegal search and seizure. E.g., Calero-Colon v. Betancourt-Lebron, 68 F.3d 1 (1st Cir. 1995) (applying Heck to a Fourth Amendment unlawful arrest case and analogizing plaintiff's claim to malicious prosecution action such that accrual was delayed for limitations purposes); Smith v. Holtz, 87 F.3d 108 (3d Cir. 1996) (applying Heck to Fourth, Sixth and Fourteenth Amendment violations pertaining to the plaintiff's right to a fair trial, and holding Heck delayed the accrual of limitations while plaintiff's criminal proceedings were still pending); Brooks v. City of Winston-Salem, N.C., 85 F.3d 178 (4th Cir. 1996) (holding Heck's delayed-accrual rule inapplicable to a plaintiff's unlawful warrantless arrest

Analysis of the Circuit Conflict. Footnote 7 of the Heck case has been interpreted inconsistently between various circuit courts of appeals. There exists a clear-cut, direct conflict between the Sixth and Seventh Circuits in their respective approaches and holdings regarding Fourth Amendment search and seizure claims. The Seventh Circuit applies a brightline exception for such claims. The Sixth Circuit applies a factually intensive, independent review. The Eighth, Ninth and Eleventh Circuits follow an approach similar to the Seventh. The Second and Fifth Circuits follow an approach similar to the Sixth. While all other circuit courts of appeals have had occasion to opine on Heck, it is not clear how they would apply Heck's footnote 7 in the unlawful search and seizure context.

The differences in opinions as evidenced in the Sixth Circuit's decision in the instant case (as well as in Schilling, 58 F.3d at 1081) versus, for example, the Seventh Circuit's decision in Gonzalez, 133 F.3d at 551, are stark indeed. These differences have existed since just after Heck was handed down. This rift between the Sixth and Seventh Circuits is overdue for resolution, having ripened now for four years. The conflicting opinions have been repeatedly noted in published opinions, and respectfully disagreed with by each sister circuit with no sign of retreat from either. While the Second, Fifth, Eighth, Ninth and Eleventh Circuits have all addressed the same Heck-interpretation issues, none have clarified the issues any further, nor resolved the conflict. Instead, these circuits appear to line up on one side or the other of the conflict.

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claim which accrued when the arrest occurred and was now barred by limitations, but applying Heck to delay the accrual of plaintiff's other Fourth Amendment claims arising after legal process (warrant) was issued and thereby saving the other claims from a limitations bar).

For the sake of uniformity, certainty and predictability in the law, especially as the law pertains to the proper calculation of claim accrual and limitations, this Court should intercede and resolve this conflict. The Sixth Circuit's independent review approach not only conflicts with the brightline approach of the Seventh Circuit, but is totally unworkable for the practical reasons so aptly discussed in Judge Glasser's dissent in Covington. Parties cannot be expected to predict an accurate date of accrual for limitations purposes based on how a judge might later independently analyze doctrines such as inevitable discovery, independent source or harmless error. Therefore, the Seventh Circuit's brightline approach is the only truly workable rule for claim-accrual as it provides the requisite certainty and predictability the law requires of limitations. See Wilson v. Garcia, 471 U.S. at 266 ("[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of...limitations").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 1999 FED App. 0241P (6th Cir.)
File Name: 99a0241p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALI SHAMAEIZADEH,
Plaintiff-Appellant,

v. ***NO. 98-5451***

JOEL CUNIGAN; MARK WILES; ASSISTANT CHIEF WAYNE GRANT; SAM MANLEY; JOHN TELEK; RICHMOND POLICE DEPARTMENT; THE CITY OF RICHMOND, KENTUCKY,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 97-00121----Karl S. Forester, District Judge.

Argued: March 17, 1999
Decided and Filed: July 1, 1999

Before: JONES, CONTIE, and MOORE, Circuit Judges.

COUNSEL

ARGUED: David R. Marshall, Lexington, Kentucky, for Appellant. Douglas L. McSwain, STURGILL, TURNER, BARKER & MOLONEY, Lexington, Kentucky, for Appellees. ON BRIEF: David R. Marshall, Lexington, Kentucky, for Appellant. Douglas L. McSwain, David B. Pearce, STURGILL, TURNER, BARKER & MOLONEY, Lexington, Kentucky, for Appellees.

OPINION

KAREN NELSON MOORE, Circuit Judge. Ali Shamaeizadeh brought this 42 U.S.C. §1983 action for damages related to an allegedly illegal search of his house by state officials and subsequent criminal proceeding by federal prosecutors. The criminal charges brought against Shamaeizadeh were eventually dismissed. The district court found that Shamaeizadeh's claim was barred by the applicable status of limitations. We REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

I

Shamaeizadeh claims that his constitutional rights under the Fourth and Fourteenth Amendments were violated when police officers employed by the City of Richmond, Kentucky, searched his residence at 121 Millstone Road (hereinafter "Millstone") in

Richmond on March 14, 1994. As a result of this allegedly unconstitutional search and the subsequent seizure of property from the residence, claims Shamaeizadeh, he was arrested and prosecuted in federal court, incurring large expenses and a myriad of other tangible and intangible damages.

The facts leading up to this case have been set out previously by this court in a published opinion, *see United States v. Shamaeizadeh*, 80 F.3d 1131 (6th Cir. 1996), and will thus be appropriately limited here. On the date of the search, Shamaeizadeh was living with his fiancé, Theresa Schmitt, in the upper level of a two-level house that Shamaeizadeh owned. Brian Reed and Joe Ford lived in the lower level of the house.

On the evening of March 14, 1994, Schmitt called the police alleging that a burglary had taken place on the premises. Officer Mark Wiles of the Richmond Police Department responded to the call. Schmitt asked Wiles to search the house. He first searched the upper level. During the search, Wiles noticed a broken door that led to the lower level apartment. Schmitt claimed she had broken the door in order to use the telephone of the lower-level apartment. Wiles also detected the smell of marijuana. Wiles then went onto a deck overlooking the back yard. Schmitt remained inside, entered the lower-level apartment, and exited from it into the back yard. She then asked Wiles to search the lower level apartment. She explained that the two occupants were away. Wiles searched the lower level.

Wiles did not find anything of import in the lower-level apartment. Many of the doors were locked. He did, however, further detect the smell of marijuana. He thus called the Assistant Police Chief, Wayne Grant, for assistance. Grant arrived, and without requesting permission Wiles and Grant proceeded to search both levels of the house. They discovered

marijuana cigarette butts in an ashtray in the lower level. They then found a box of fluorescent light bulbs and noticed that fluorescent lighting turned on and off intermittently in one of the locked rooms. They suspected that the lights were being used to grow marijuana. They called in Officer Joel Cunigan, a trained and experienced detector of marijuana, and Sergeant Sam Manley.

Grant, Manley, and Cunigan searched Millstone for a third time. Cunigan thought that there was a strong smell of marijuana in the lower-level apartment, and he discovered a hemostat, rolling papers, and a bag of catnip that he thought was marijuana. Schmitt, after being advised of her rights, told the officers she thought Reed and Ford were growing marijuana in the lower-level apartment.

Cunigan secured a search warrant from a county district court judge. The officers executed the search warrant, forcibly entering the locked rooms of the lower level, and seized 393 marijuana plants and various marijuana-growing equipment. The officers arrested Shamaeizadeh, Reed, and Ford, who were later indicted under federal drug laws 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. §§ 2 and 924(c)(1). Shamaeizadeh was further charged with using Millstone to commit or facilitate the drug violations under 21 U.S.C. § 853, for which the property would be subject to forfeiture.

Upon a motion to suppress the seized evidence[1] the district

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[1] It is interesting to note that "[t]he district court denied Shamaeizadeh standing to participate in [this] motion to suppress because he had no reasonable expectation of privacy with regard to the basement floor of Millstone, where the inculpatory contraband was found." *Shamaeizadeh*, 80 F.3d at 1135 n.1. This court dismissed for lack of

court judge, adopting a magistrate judge's report, found the first warrantless search constitutional due to "exigent circumstances." The judge concluded that the second and third warrantless searches violated the Fourth Amendment, however, and redacted the portions of Cunigan's affidavit used to secure the search warrant that referred to evidence obtained during the second and third warrantless searches. The district judge concluded that the redacted affidavit did not provide probable cause to support a search warrant for the lower level of the apartment.

The government appealed to this court, arguing that even the redacted affidavit supported the issuance of a search warrant for both levels of the house. In a published opinion, this court disagreed. *See Shamaeizadeh*, 80 F.3d at 1138-39. The Sixth Circuit opinion was filed on April 9, 1996, and the government dismissed the charges against Shamaeizadeh on that day. Shamaeizadeh filed this 42 U.S.C. §1983 action on April 8, 1997. The district court, applying Kentucky's one-year statute of limitations for personal-injury actions, found that the limitations period began to run on the date of the search, not the date the criminal charges against Shamaeizadeh were dismissed. The district court then dismissed Shamaeizadeh's §1983 claim as untimely.

Shamaeizadeh appealed. We have jurisdiction over the appeal pursuant to 28 U.S.C. §1291. The district court had jurisdiction under 28 U.S.C. §1343(3) & (4).

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appellate jurisdiction an attempted appeal by Shamaeizadeh from the decision of the district court. *See United States v. Shameizadeh* [sic], 41 F. 3d 266, 267 (6th Cir. 1994).

II

The issue before the court is the date on which the statute of limitations begins to run for 42 U.S.C. §1983 actions claiming an alleged unconstitutional search and seizure. Although this issue is a matter of federal law, we apply the relevant state statute of limitations for personal injury actions absent special circumstances. *See Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 519 (6th Cir. 1997). We agree that Kentucky's one-year statute-of-limitations period for personal injury actions applies to § 1983 claims of this type. *See Collard v. Kentucky Bd of Nursing*, 896 F. 2d 179, 182 (6th Cir. 1990). Typically the statute of limitations for filing an action alleging an unconstitutional search and seizure begins to run at the time of the injury - when the plaintiff knows or has reason to know about the occurrence of the unconstitutional search. *See Kuhnle Brothers, Inc.*, 103 F.3d at 520 (stating that "[o]rdinarily, the limitations period starts to run 'when the plaintiff knows or has reason to know of the injury which is the basis of his action'" (quoting *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984)). In light of the Supreme Court's opinion in *Heck v. Humphrey*, 512 U.S. 477 (1994), however, the resolution of this issue is more complicated.

In *Heck*, an inmate in a state prison brought a § 1983 action against two state prosecutors and a state police investigator, claiming that the defendants knowingly destroyed exculpatory evidence and caused the use of an illegal voice-identification procedure at trial. Heck sought compensatory and punitive damages but did not ask for injunctive relief. The Supreme Court held that Heck could not recover damages under § 1983 because his conviction had not "been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into

question by a federal court's issuance of a writ of habeas corpus." *Id.* at 487. The holding was premised, in part, on the Court's attempt to square "the two most fertile sources of federal-court prisoner litigation - the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254." *Id.* at 480.

The Supreme Court had previously held in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), "that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." Heck, 512 U.S. at 481 (citing Preiser, 411 U.S. at 488-90). Despite the fact that damages are not allowable in a habeas corpus proceeding, the Court in *Heck* nevertheless held that awarding damages in a § 1983 action would, in certain cases, "necessarily demonstrate[] the invalidity of the conviction." *Id.* at 481-82. The Court, noting that § 1983 is a species of tort liability, and that the federal courts have often looked to common law to frame the boundaries of a § 1983 suit, analogized § 1983 actions to the common law cause of action for malicious prosecution. Adopting an element of a prima-facie claim for malicious prosecution ---"termination of the prior criminal proceeding in favor of the accused," *id* at 484 - the Court held that Heck's § 1983 claim against the state officials was not cognizable in the face of his still-outstanding conviction.

The Supreme Court's opinion in *Heck* included a caveat. The Court wrote: "[I]f the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* at 487 (footnotes

omitted). The Supreme Court gave an example in a footnote, stating:

> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury which, we hold today, does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Id. at 487 n.7 (citations omitted).

Federal courts have interpreted this footnote in two different ways. Certain courts read this language to create a general exception to the doctrine of *Heck* for Fourth Amendment unreasonable-search claims brought against state officials under §1983. *See, e.g., Copus v. City of Edgerton,* 151 F.3d 646, 648 (7th Cir. 1998) (interpreting footnote 7 of *Heck* to mean "that Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so in all cases these claims can go forward"); *Simmons v. O'Brien,* 77 F.3d 1093 (8th Cir. 1996) (holding that harmless error analysis applies to confessions obtained in violation of the Fifth Amendment as with Fourth Amendment claims, and therefore a coerced-confession claim in a § 1983 action has accrued even in the face of an outstanding conviction because the validity of

the conviction will not necessarily be challenged by a successful § 1983 suit); *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (holding that *Heck* "is no bar to Datz' civil action because, even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error").

Other courts have held that Fourth Amendment claims could be brought under § 1983 notwithstanding a valid conviction, but only once the district court has made an independent determination that success on the § 1983 claim would not demonstrate the invalidity of the conviction. *See, e.g., Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (holding that a § 1983 claim for an unlawful arrest would not necessarily demonstrate the invalidity of a conviction, but the district court would have to evaluate the evidence presented at the criminal trial, and § 1983 proceedings were therefore ordered stayed "until the pending criminal case has run its course").

We dealt with *Heck's* applicability to Fourth Amendment claims in *Schilling v. White*, 58 F.3d 1081 (6th Cir. 1995). In *Schilling*, a state prisoner filed a § 1983 claim for damages against two Ohio police officers, alleging that the officers illegally searched him and his car in violation of his constitutional rights under the Fourth Amendment. *Id.* at 1082-83. Schilling admitted upon inquiry by the court that he had pleaded guilty to driving under the influence of drugs. The conviction had not been overturned or expunged. *Id.* at 1083. This court read the footnote in *Heck* as clearly rejecting the conclusion that a general exception to the requirement that a conviction be set aside exists for Fourth Amendment claims under § 1983. *Id.* at 1086.

Schilling did not reject the second reading of *Heck* above - that if a district court, after an independent review, determined that a § 1983 cause of action would not imply the invalidity of an outstanding conviction, the § 1983 action could proceed. The *Heck* footnote, on which the *Schilling* court relied, explicitly states that if evidence obtained at the allegedly unconstitutional search resulted in the § 1983 plaintiff's conviction, after being admitted under an exception to the exclusionary rule, a § 1983 action may lie, but the § 1983 plaintiff may not seek damages for the injury of being convicted and imprisoned until the conviction is overturned. *Cf. Braxton v. Scott*, 905 F. Supp. 455, 458 (N.D. Ohio 1995) (reasoning that the more plausible reading of *Schilling* is that "fourth amendment claims under § 1983 may be brought without setting aside the conviction only if success would not undermine the conviction and if the plaintiff alleges a compensable injury other than the conviction").

The *Schilling* court appears to have based its holding on the fact that Schilling sought damages relating to his conviction. Thus, success on Schilling's § 1983 claim would necessarily have challenged the validity of his conviction, and Schilling could not bring his claim.[2]

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[2] The *Schilling* court points out that in *Heck* Justice Scalia "examined the common law of tort liability and concluded that proof of the illegality of a conviction is a necessary element of the § 1983 cause of action. Unless that conviction has been reversed, there has been no injury of constitutional proportions, and thus no § 1983 suit may exist." *See Schilling*, 58 F.3d at 1086. Proof of illegality of the conviction is a necessary element of a § 1983 cause of action, of course, only when, as the *Schilling* court also quoted from *Heck*, the § 1983 plaintiff seeks damages for an allegedly unconstitutional conviction or imprisonment.

Turning to the focus of this case - the commencement date for the running of the statute of limitations - neither *Heck* nor *Schilling* definitively resolves the issue before us. The Supreme Court in *Heck* specifically noted that the statute of limitations posed no difficulty in that case. A cause of action under § 1983 that would imply the invalidity of a conviction does not accrue until the conviction is reversed or expunged, and therefore the statute of limitations does not begin to run until such an event occurs, if ever. *See Heck*, 512 U.S. at 489-90. *See also Schilling*, 58 F.3d at 1087 n.5.[3] The underlying theory of *Heck*, however, provides the foundation for the proper resolution of the issue in this case.

Shamaeizadeh's § 1983 claim is based on an alleged violation of his rights under the Fourth and Fourteenth Amendments due

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[3] In a recent Supreme Court case, *Spencer v. Kemna*, 523 U.S. 1, ---, 118 S. Ct. 978,-989 (1998), Justice Souter, concurring and joined by Justices O'Connor, Ginsburg, and Breyer, indicated that *Heck's* favorable termination requirement should no longer apply after a plaintiff had served the term of imprisonment. Apparently, in such a situation, the statute of limitations would begin to run when the plaintiff has satisfied his term of imprisonment. Justice Stevens, who dissented from the majority opinion, nevertheless agreed with Justice Souter on this issue, thereby providing a majority of the Court. *See id.* at 992 n.8 (Stevens, J., dissenting). The clarification by the Supreme Court of this issue calls one aspect of the *Schilling* case into doubt. This court held in *Schilling* that "*Heck* applies as much to prisoners in custody (a habeas prerequisite) as to persons no longer incarcerated." *Schilling*, 58 F.3d at 1086. It is not clear from the opinion whether Schilling served any time in prison after pleading guilty to the charges against him or whether he was ever in custody. The majority of the Court in *Spencer*, however, now clearly excludes from *Heck's* favorable termination requirement former prisoners no longer in custody.

to the state police officers' follow-up warrantless searches at Millstone of the lower-level apartment and their seizure of various marijuana and marijuana-producing items. Shamaeizadeh seeks compensatory and punitive damages based on the alleged illegal seizure of property and the fact that he was "forced to expend great sums to defend himself and his name, including posting bond, paying attorneys and incurring other litigation expenses, lost wages, suffered impairment to his power to earn money, suffered medical expenses, and suffered pain, embarrassment, and humiliation and will continue to so suffer." *See* J.A. at 69 (Second Am. Compl.).

Unlike the plaintiff in *Heck*, Shamaeizadeh is not a prisoner. Shamaeizadeh was neither tried nor convicted. He never had a claim for relief under the writ of habeas corpus.[4] Therefore Shamaeizadeh's § 1983 claim would not be an attempt to sidestep the exclusive remedy of habeas corpus for challenging a conviction, as was at issue in *Heck*. As indicated above, the charges against him were dismissed after this court affirmed the district court's finding that the second and third warrantless searches of the downstairs apartment of Millstone were invalid. Shamaeizadeh argues, however, that the underlying logic of *Heck* and *Schilling* nonetheless controls the outcome of this case, and that his cause of action under § 1983 did not accrue until the charges against him were dismissed. We agree.

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[4]Although *Heck* dealt with a § 1983 action filed in federal court by a state prisoner, this court has held that the logic of *Heck* applies with equal force to federal prisoners. *See Robinson v. Jones*, 142 F.3d 905, 907 (6th Cir. 1998) ("*Heck* holding applies equally to an action brought under *Bivens*"). In this case, Shamaeizadeh is suing state officials for actions that led to the initiation of a federal prosecution. We think it clear that the logic of *Heck* is relevant here as well.

Other courts have extended the reasoning of *Heck* to certain pre-conviction situations where habeas is not available. In *Smith v. Holtz*, 87 F.3d 108 (3d Cir. 1996), the § 1983 plaintiff, Smith, sought compensation for an allegedly unconstitutional conviction and imprisonment. Smith was convicted of murder in a Pennsylvania state court, but the conviction was reversed on direct appeal. Although the case was remanded for a new trial, the appellate court ordered all charges dismissed before commencement of the new trial. After the charges were dismissed, Smith filed his § 1983 claim alleging that the conviction had been unlawful. The defendants argued that Smith's claims were barred by the applicable statute of limitations, because in their view the statute of limitations began to run when his conviction was reversed.

The Third Circuit, framing the issue as "whether . . . a claim is cognizable under § 1983 where its success would necessarily imply the invalidity of a future conviction that might be entered on a pending criminal charge," *id* at 109, held that the statute of limitations did not begin to run until the charges against Smith were dismissed. *See also Covington v. City of New York, 171* F.3d 117, 124 (2d Cir. 1999) (holding that "[i]t is true that *Heck* did not directly address the issue of the accrual of claims that, if successful, would necessarily imply the invalidity of a potential conviction on a pending criminal proceeding. However, we agree with the Third Circuit that the reasoning in *Heck* is applicable to such a case"). After discussing the rationale behind the decision in *Heck*, the *Smith* court wrote:

We find that these concerns apply equally to claims that, if successful, would necessarily imply the invalidity of a future conviction on a pending criminal charge. A claim by a defendant in an ongoing criminal prosecution which necessarily challenges the legality of a future conviction on a pending criminal charge

lies at the intersection of the federal habeas corpus statute and the Civil Rights Act of 1871. If such a claim could proceed while criminal proceedings are ongoing, there would be a potential for inconsistent determinations in the civil and criminal cases and the criminal defendant would be able to collaterally attack the prosecution in a civil suit. In terms of the conflicts which *Heck* sought to avoid, there is no difference between a conviction which is outstanding at the time the civil rights action is instituted and a potential conviction on a pending charge that may be entered at some point thereafter.

Smith, 87 F.3d at 113.[5]

We agree with the reasoning of the Third Circuit in *Smith* that the concerns of *Heck* apply pre-conviction as well as post-conviction.[6] Unlike the § 1983 plaintiffs in *Smith* and

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[5] Pursuant to *Preiser*, if the criminal defendant is in custody during the criminal proceedings, any § 1983 cause of action that would seek to end or shorten custody would be deemed a habeas corpus action, and could not be brought under § 1983. *See, e.g., Antennal v. Foster*, 104 F.3d 899, 900 (7th Cir. 1997) (holding that *Heck* applies to a § 1983 plaintiff who is confined pursuant to legal process but reconviction). Under *Heck*, the rule would apparently be the same for a criminal defendant in custody seeking damages under § 1983 if an award of damages would imply the invalidity of any subsequent conviction.

[6] Indeed, this court recently adopted this conclusion. In *Callihan v. Schneider*, No. 98-6077, --- F.3d ---, 1999 WL 336307 (6th Cir. May 28, 1999), a pro se § 1983 plaintiff appealed a district court order denying his motion to appeal in forma pauperis. The district court dismissed the case as premature pursuant to *Heck* because the § 1983 plaintiff was facing state criminal charges. After holding that a party could proceed on appeal in forma pauperis under Fed. R. App P. 24,

Covington, however, Shamaeizadeh's alleged injury is not unlawful conviction and subsequent imprisonment, but rather injury caused by an unlawful search resulting in the initiation of criminal proceedings against him. In light of this court's analysis of Fourth Amendment claims in *Schilling*, however, this distinction does not alter our result.

Under *Schilling*, a prisoner seeking to challenge an allegedly unconstitutional search and seizure in a § 1983 claim must show that a decision in his favor would not imply the invalidity of his outstanding conviction. Therefore, because we hold that the reasoning of *Heck* applies pre-conviction, *Schilling* also requires that a § 1983 plaintiff show that a decision in his favor would not imply the invalidity of a future conviction.

Since it appears that the only evidence that was to be introduced against Shamaeizadeh was evidence discovered in Shamaeizadeh's house during the allegedly illegal search, it would not have been possible, while the criminal proceedings

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this court wrote:

> Callihan's appeal is nevertheless frivolous and the district court did not err in denying Callihan leave to proceed in forma pauperis. As Callihan is apparently facing state criminal charges, under *Heck*, Callihan's civil rights action must be dismissed without prejudice until the state proceedings have resulted in a not guilty verdict, or any conviction has been overturned on appeal or questioned in a federal habeas corpus petition.

Id. at *4 (citing *Heck*, 512 U.S. at 486-87).

against Shamaeizadeh were pending, to determine whether a decision on Shamaeizadeh's claim would imply the invalidity of his potential conviction without deciding issues common to the criminal action - i.e., whether the search was lawful. if the criminal court eventually deemed the search lawful, and Shamaeizadeh had been convicted based on evidence obtained during the search, under *Heck* no § 1983 cause of action would be available. Pursuant to footnote 7 of *Heck*, if the search had been deemed unlawful, but the government had proceeded with the case against Shamaeizadeh and succeeded in admitting the evidence discovered during the search under an exception to the exclusionary rule, Shamaeizadeh, if convicted, could not bring a § 1983 claim for damages related to his conviction or confinement. As a result, Shamaeizadeh could not bring an action seeking damages related to the criminal proceeding brought against him until a disposition in that proceeding had been reached.[7] We hold, therefore, that the proper starting point for the running of the statute of limitations is the date of the dismissal of the criminal charges.[8]

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[7]The District Court relied on *Chatman v. Slagle*, 107 F.3d 380 (6th Cir. 1997), in holding that the statute of limitations in this case began to run at the time of the search. *Chatman* concluded that in a case in which a criminal prosecution has been dismissed, questions regarding the potential admissibility of evidence at a hypothetical trial have no bearing on a subsequent § 1983 action challenging the search. The *Chatman* court had no occasion to discuss the accrual of the § 1983 cause of action in such situations.

[8]Because the government may appeal a suppression order, as it did here, we do not hold that the statute of limitations begins to run on the date the suppression order was issued.

We further conclude that holding that the statute of limitations begins to run at the time of the search, and requiring that a federal court stay any § 1983 action brought during, and related to, criminal proceedings would not adequately deal with this issue.[9] To require a defendant in a criminal proceeding to file a civil action raising any potential § 1983 claims within one year of any alleged illegal searches or other alleged violations of constitutional rights, claims which the federal court must then abstain from resolving until the disposition of the criminal proceedings, would misdirect the criminal defendant. Surely, just as a convicted prisoner must first seek relief through habeas corpus before his § 1983 action can accrue, so too should the defendant in a criminal proceeding focus on his primary mode of relief - mounting a viable defense to the charges against him - before turning to a civil claim under § 1983. Moreover, if the criminal defendant is eventually convicted, *Heck* would often require that a federal court then dismiss without prejudice any § 1983 claims that are filed because they have not yet accrued. We conclude that it is only appropriate that the statute of limitations not begin to run for criminal defendants seeking to file the same § 1983 claims until the disposition of any pending criminal proceedings.[10]

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[9] In *Heck*, the Supreme Court, citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), wrote, "if a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention maybe an appropriate response to the parallel state-court proceedings." *See Heck*, 512 U.S. at 487 n.8. This footnote, however, is questioning whether abstention may be appropriate even when a successful § 1983 claim would not imply the invalidity of a conviction.

[10] After the disposition of the criminal proceedings, if the § 1983 claim may go forward under *Heck*, the plaintiff may seek all damages related

The criminal charges against Shamaeizadeh were dismissed on April 9, 1996, and Shamaeizadeh filed his § 1983 action on April 8, 1997. Shamaeizadeh thus appears to have filed his § 1983 action within Kentucky's one-year statute of limitations for personal injury actions.

III

For the reasons stated above, we **REVERSE** the judgment of the district court, and **REMAND** for further proceedings consistent with this opinion.

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to the allegedly illegal search. Therefore, Shamaeizadeh may seek damages that arose at the time of the search as well as damages resulting from the criminal proceedings brought against him.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-121

ALI SHAMAEIZADEH, PLAINTIFF,

V. **OPINION AND ORDER**

JOEL CUNIGAN, *et al.*, DEFENDANTS.

* * * * * * * * * *

This matter is before the Court pursuant to Defendants' Fed.R.Civ.P. 12(b)(6) motion to dismiss. Jurisdiction exists under 28 U.S.C. §1331. Having been fully briefed, this matter is ripe for review.

I

Factual Background.

On March 14, 1994, the Richmond Police Department received a call regarding a possible burglary at 121 Mill Stone Drive, Richmond, Kentucky. The call was placed by a woman who claimed to be Plaintiff's fiancé, Theresa Schmitt. Defendant Wiles was the first officer to arrive at the residence in response to the burglary call. Wiles learned from Schmitt that the residence was divided into separate living quarters. The upper level was occupied by Plaintiff and Schmitt with the

lower level leased to two tenants. At Schmitt's request, Wiles searched both levels, entering the lower level through a broken door. While conducting the initial search, Wiles detected the smell of growing marijuana.

After completing the walk-through of the basement, Wiles contacted Defendant Grant for assistance. When Grant arrived, he and Wiles conducted a second search of the basement apartment. During the course of the second search, the officers discovered small marijuana cigarette butts and fluorescent lighting of a type often used in indoor marijuana growing operations.

Following this search, Defendants Manley and Cunigan were called for assistance. Cunigan did not normally respond to burglary calls, but had extensive experience in detecting marijuana. Grant, Manley and Cunigan conducted a third search of both levels and found additional marijuana related contraband. Cunigan also claims to have detected a strong odor of growing marijuana. Based upon this and other information, a search warrant issued.

After securing the warrant, the law enforcement officers conducted a fourth search of the residence. In the tenant's apartment, 393 marijuana plants and other paraphernalia were found and seized. Several of Plaintiff's personal and business papers were seized from a locked room in the Plaintiff's portion of the residence. Plaintiff and his tenants were arrested and charged with drug trafficking. Plaintiff was also charged with renting the basement apartment for the purpose of unlawfully manufacturing, storing, or distributing marijuana.

On June 21, 1994, Plaintiff moved to suppress the evidence. The Magistrate Judge found that the first warrantless search

was constitutional due to exigent circumstances. By contrast, the second and third searches were not constitutional, and the Magistrate Judge recommended that the information contained in the affidavit be narrowed to only reflect that obtained as a result of the first search. The Magistrate Judge then found the information contained in the resulting affidavit insufficient to support a finding of probable cause and recommended suppression. This Court adopted the Magistrate Judge's recommendations on September 30, 1994 and ordered the evidence suppressed. The Sixth Circuit affirmed on April 9, 1996 and the government dismissed the charges. On April 8, 1997, Plaintiff filed this action seeking relief under 42 U.S.C. §1983 based on the illegal search, wrongful arrest and malicious prosecution. In addition, Plaintiff alleges abuse of process and intentional infliction of emotional distress.

II. Discussion.

Defendants' motion to dismiss is based on a number of theories. First, Defendants argue Plaintiff's §1983 claim as it relates to the illegal search and wrongful arrest is time barred. Second, they contend Plaintiff fails to state a claim under §1983 for malicious prosecution. The Court will address these arguments in turn.

a. Statute of Limitations.

1. Illegal Search.

Defendants argue Plaintiff's §1983 claim based on the illegal search is time-barred as this action was filed more than one year from the date of the search. Plaintiff counters by asserting that in accordance with the United States Supreme Court decision of *Heck v. Humphrey*, 512 U.S. 477 (1994), the limitations

period in this case did not begin to run until the criminal charges against him were dismissed.

While federal law governs when a cause of action for purposes of the limitations period accrues, the limitations period is determined by state law. *See Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 180 (6th Cir. 1990). For §1983 actions, KRS 413.140 provides the applicable limitations period, which is one year. *Id.* at 183. Generally, a cause of action accrues when the plaintiff knows or in the exercise of reasonable diligence should have known of his injury. *See McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988). In the illegal search context, a §1983 action accrues at the time of the search. *Kaster v. Iowa*, 975 F.2d 1381 (8th Cir. 1992); *Johnson v. Johnson County Commission Bd.*, 925 F.2d 1299 (10th Cir. 1991).

Plaintiff argues, however, that *Heck* provides a new framework for determining when a §1983 claim accrues. In *Heck*, the Supreme Court held that a conviction or confinement must be reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus in order for a §1983 claim to be cognizable. *Heck*, 512 U.S. at 486-87. "A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under §1983." *Id.* In essence, a prisoner's §1983 action does not "accrue" until his conviction or sentence is set aside and the general rule that a cause of action accrues when the plaintiff knows of the harm is inapplicable. *See id.* at 489 ("[t]hat makes it unnecessary for us to address the statute-of-limitations issue wrestled with by the Court of Appeals...").

Plaintiff attempts to extend the applicability of *Heck* to cases such as this where there was no trial, conviction or confinement and asserts that his claim did not accrue until the Court of Appeals affirmed this Court's order granting his motion to suppress and the charges were dismissed. Plaintiff poses a compelling argument, but while the dismissal of the charges is certainly analogous to the invalidation of conviction or sentence, the similarities end there. *Heck* is a prisoner's ability to "circumvent the procedural hurdles of modern habeas corpus law by using §1983 to bring what is essentially a habeas petition." *Chatman v. Slagle*, 107 F.3d 380, 382 (6th Cir. 1997). If success in a §1983 action necessarily implies that the underlying conviction is invalid, the aforementioned prerequisites must be satisfied. *Id.* (Citing *Heck*, 512 U.S. at 487).

The Sixth Circuit recently addressed the applicability of *Heck* when a plaintiff is successful in a motion to suppress evidence obtained through an illegal search and held that where there has been no trial, and hence, no conviction or sentence, *Heck* does not apply. *Id.* Even if a plaintiff is subjected to an illegal search but is nonetheless convicted, *Heck* does not apply because suppression would have made prosecution difficult but would not "negate an element of the offense of which he has been convicted and would thus not create the conflicts at the heart of *Heck*." *Id.* At 383 (citing *Heck*, 512 U.S. at 486 n. 6)(quotations omitted); *see also Heck*, 512 U.S. at 487 n.7 ("[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the . . . conviction."). Here, since Plaintiff was neither tried nor convicted, the concerns of *Heck* are not implicated and his claim was "cognizable" immediately. Therefore, the general rules governing accrual apply.

The search and subsequent arrest in question took place March 14, 1994. On June 21, 1994, Plaintiff moved to suppress the evidence and said motion was granted on September 30, 1994. The government filed its notice of appeal on October 25, 1994 and the Sixth Circuit affirmed on April 9, 1996. According to the general rule that a §1983 action accrues at the time of the search, Plaintiff's action accrued on March 14, 1994. Since Plaintiff filed this action on April 8, 1997, more than one year after the date of the search, the claim is time-barred.

Even the most liberal application of accrual principles, short of following *Heck*, yields similar results. If Plaintiff did not know or have reason to know that his rights were violated until he filed the motion to suppress on June 21, 1994, and if the Court equitably tolled the statutory period while the government's appeal was pending, Plaintiff's claim would still be time-barred as more than one year passed between the dates on which the motion to suppress and this action were filed. The same may be said if the date on which this Court granted the motion to suppress is deemed when Plaintiff knew of his injury because twenty-five days passed from the date of the order and the government's filing of a notice of appeal and this action was filed one year from the date of the Sixth Circuit's decision.

2. Wrongful Arrest.

Plaintiff's §1983 claim based on an alleged wrongful arrest is destined for the same fate. As was the case with respect to the illegal search, *Heck* does not apply because Plaintiff was not tried or convicted. Instead, when the wrongful arrest claim accrued is measured by when Plaintiff knew or should have known when the wrong occurred. A cause of action for wrongful arrest accrues at the time of the arrest. *McCune v. City of Grand Rapids*, 842 F.2d 903, 906 (6th Cir. 1988). Here, Plaintiff was arrested on March 14, 1994 but failed to file

the instant action until April 8, 1997. Consequently, his §1983 claim based on an alleged wrongful arrest is time-barred.[1]

b. Malicious Prosecution.

The complaint and amended complaints, which are hardly models of clarity, refer to the illegal search leading to Plaintiff's wrongful arrest and prosecution. On its face, reference to the wrongful arrest and prosecution of Plaintiff describes the harm caused by the illegal search and are not separate bases for his §1983 claim. Construing the complaint liberally in terms of recognizing "wrongful arrest and prosecution" as separate allegations of wrongful arrest and malicious prosecution under §1983, Plaintiff nonetheless fails to meet his heightened pleading burden. *See Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995). When the defense of qualified immunity is asserted, as it is here, a plaintiff may not rest on his "notice" pleading but must respond with "specific, non-conclusory allegations of fact that will enable the district court to determine if those facts, if proved, will overcome the defense of qualified immunity." *Id.* Here, even through the most liberal interpretation, Plaintiff's complaint and amended complaints fail to allege facts which, if proved, negate Defendants' immunity defense with respect to the malicious prosecution claim. Consequently, dismissal of this facet of the §1983 claim as to the individual Defendants is appropriate.

---

[1] Assuming, *arguendo*, that analysis under *Heck* is required, success on a §1983 claim grounded in wrongful arrest filed while criminal charges against Plaintiff were pending does not necessarily imply the invalidity of those charges. *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997). Since the concerns *Heck* is designed to alleviate are not present, Plaintiff's claim was "cognizable" at the time of the arrest.

Plaintiff's malicious prosecution claim, to the extent one is alleged, against the City of Richmond and the Richmond Police Department must also be dismissed. A plaintiff seeking relief for malicious prosecution must prove (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings; (2) by, or at the instance of, the [defendant]; (3) the termination of such proceedings in [plaintiff's] favor; (4) malice in the institution of such proceedings; (5) want or lack of probable cause for the proceeding; and (6) the suffering of damage as a result of the proceeding. *McMaster v. Cabinet of Human Resources*, 824 F.2d 518, 520 (6th Cir. 1987) (citing *Raimer v. Drasin*, 621 S.W.2d 895 (Ky. 1981)).

To survive a Fed.R.Civ.P. 12(b)(6) motion in a §1983 action, a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. [I]n the context of a civil rights claim ... conclusory allegations of unconstitutional conduct without specific factual allegations fail to state a claim...." *Lillard v. Shelby County Board of Education*, 76 F.3d 716, 726 (6th Cir. 1996). Here, plaintiff fails to plead facts which, if proved, are sufficient to support a finding of malicious prosecution as to the City of Richmond and the Richmond Police Department. Accordingly, dismissal is proper.

c. Failure to Train or Supervise.

Plaintiff also alleges the City and Department failed to properly train or supervise the other Defendants. However, he fails to allege "circumstances, occurrences, and events in support of the claim presented" with sufficient definiteness. *See Veney*, 70 F.3d at 922. Plaintiff only makes the conclusory allegation that these entities showed deliberate indifference

towards the violation of his constitutional rights. He does not, notwithstanding attachment of the Magistrate Judge's report and recommendation entered pursuant to his motion to suppress, allege facts linking the conduct of the individual officers to a policy of the City or the Department. *See Vine v. County of Ingham*, 884 F.Supp. 1153, 1158 (W.D. Mich. 1995). Therefore, this portion of Plaintiff's claim must also be dismissed.

d. Supplemental Jurisdiction.

Plaintiff also alleges state law claims of intentional infliction of emotional distress and abuse of process. A district court may decline to exercise supplemental jurisdiction over a plaintiff's state law claim if the claim over which the Court has original jurisdiction is dismissed. 28 U.S.C. §1367(c)(3). Since there is no indication that the interest in avoiding resolution of state law issues is outweighed by any savings of judicial resources, *see Hankins v. Gap, Inc.*, 84 F.3d 797, 803 (6th Cir. 1996), the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.

Accordingly, **IT IS HEREBY ORDERED**

(1) Defendants' motion to dismiss [DE#5] is **GRANTED;** and

(2) a judgment in favor of Defendants will be entered contemporaneously with this opinion and order.

This 2nd day of March, 1998.

/s/ Karl Forester
KARL S. FORESTER, JUDGE

Supreme Court, U.S.
FILED
OCT 2 8 1999
OFFICE OF THE CLERK

No. 99-562

In The

Supreme Court of the United States

JOEL CUNIGAN, MARK WILES, ASST. CHIEF WAYNE GREEN, SAM MANLEY, JOHN TELEK, RICHMOND POLICE DEPARTMENT, THE CITY OF RICHMOND, KENTUCKY,

Petitioners,

v.

ALI SHAMAEIZADEH, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

This case derives from charges brought when Petitioners, members of the Richmond, Kentucky police, searched a rented basement apartment in the home where Respondent, Dr. Ali Shamaeizadeh, maintained his residence. During this search, police discovered growing marijuana in locked rooms in the basement apartment. Upon the discovery of marijuana, police brought state court proceedings against the various Defendants. These were subsequently dismissed and indictments were brought in the Federal Court against Respondent and the basement tenants.

In the District Court, suppression motions were filed by each Defendant based on various grounds particular to each. After a hearing, the Magistrate found, and the District Court confirmed, that evidence found in the residential portion of Dr. Shamaeizadeh's home, which was alleged to link him to the marijuana growing in the basement apartment of the house, would be suppressed due to the fact that when the police seized these items, they were outside the scope of the warrant that they had at the time they were taken. After having seized these items, the police got a second warrant in an unsuccessful attempt to legitimatize the taking of the items already seized.

The Magistrate also found that, as to the co-defendant renters, the marijuana found in their apartment was to be suppressed as to them only, because the police had no probable cause to search their home.

The United States appealed only the suppression of the marijuana but did not appeal the suppression of the

various documents and other items found in Dr. Shamaeizadeh's residence.

Dr. Shamaeizadeh appealed the ruling of the Magistrate as to his standing to seek the suppression of the marijuana, a point which the Magistrate had denied him. This appeal was dismissed by the Sixth Circuit by reported opinion. *U.S. v. Shamaeizadeh*, 41 F.3d 266 (6th Cir. 1994).

The co-defendants' appeal proceeded wherein the Sixth Circuit affirmed the ruling of the District Judge. Thus the marijuana was suppressed as to the co-defendants. *U.S. v. Shamaeizadeh*, 80 F.3d 1131 (6th Cir. 1996). The case was returned to the trial court where the prosecutor chose to move to dismiss the matter as to all defendants despite the fact that the growing marijuana was not suppressed as to Dr. Shamaeizadeh. The Sixth Circuit's mandate of the interlocutory appeal was final April 9, 1996. The Court dismissed the indictment May 8, 1996, as to all parties.

On April 8, 1997, Dr. Ali Shamaeizadeh brought a § 1983 action for violations of his civil rights and also brought pendant state matters. The remaining procedure is accurately stated in the Petitioners' brief.

REASONS FOR DENYING THE WRIT

I. There are no splits in the Circuits as to applying *Heck* to Federal defendants.

The Petitioners come before the Court asking that the Court grant certiorari to hold that *Heck v. Humphrey*, 512

U.S. 477 (1994) does not apply to exhonorated defendants of federal prosecutions. Petitioners ask this despite the fact that no Circuit Court has ruled that *Heck* does not apply in *Bivens* actions. Instead, eight circuits have found that it does. *Tavarez v. Reno*, 54 F.3d 109, 110 (2nd Cir. 1995); *Stephenson v. Reno*, 28 F.3d 26, 27 (5th Cir. 1994); *Robinson v. Jones*, 142 F.3d 905, 907 (6th Cir. 1998); *Leavell v. Keiffer*, Slip Op. 98-4089 (7th Cir. Aug. 19, 1999); *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996); *Crow v. Penry*, 102 F.3d 1086, 1087 (10th Cir. 1996); *Abella v. Reno*, 63 F.3d 1063, 1065 (11th Cir. 1995); *Williams v. Hill*, 74 F.3d 1339, 1340 (D.C. Cir. 1996). To rule out *Heck* in federal cases would be to create chaos in the federal courts where order now reigns. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) this Court ruled § 1983 claims applied to federal actors and it is no stretch to apply *Heck* to the federal prosecution system. There is no conflict in the circuits and there is no need for this rule to be altered as the rules have been clearly and decisively applied concerning the application of *Heck v. Humphrey, id.* to exhonorated defendants in federal prosecutions.

II. Only the Seventh Circuit is Different

The Petitioners also come before this Court claiming that there is a vast split among the circuits concerning how to apply footnote 7 in *Heck*. In fact, presently, the only difference lies in the Seventh Circuit as compared to the rest of the circuits. The Eighth, Ninth and Eleventh have all come on board to apply *Heck* just as the Sixth and

the Second Circuits have done. All circuits save the Seventh now apply the same reasoning as applied in the opinion below. *White v. Gittens*, 121 F.3d 803, 807 (1st Cir. 1997); *Covington v. New York*, 171 F.3d 117 (2nd Cir. 1999), *petition for cert. filed*; *Smith v. Holtz*, 87 F.3d 108 (3rd Cir. 1996); *Brooks v. City of Winston-Salem, NC*, 85 F.3d 178 (4th Cir. 1996); *Mackey v. Dickson*, 47 F.3d 744 (5th Cir. 1995); *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999); *Wilson v. Lawrence County, Missouri*, Slip Op. No. 97-4142 (8th Cir. 1998); *Cabrera v. City of Huntington Park*, 159 F.3d 374 (9th Cir. 1998); *Beck v. City of Muskoga Police Dept.*, Slip Op. No. 98-7171 (10th Cir. 1998); *Uboh v. Reno*, Slip Op. No. 95-8557 (11th Cir. 1998).

Because Respondent was not a state-prosecuted individual but instead was indicted in federal court, his case is not appropriate to serve the purpose the Petitioners seek. To be proper precedent to either extend or limit *Heck*, a state prosecuted defendant suing under § 1983 is required. Otherwise, there would remain the question of whether this case, because of its facts, would apply to state cases. A pronouncement of same would not be resting on the law of the case but instead would be legislating issues which are not before the court. Thus to do what Petitioners seek would require judicial activism that has not been seen from this Court in may years.

The Seventh Circuit, which is admittedly different than the others, is applying its own rules to these cases. It has chosen to allow all Fourth Amendment lawsuits to be filed but then abstains from them under *Younger v. Harris*, 401 U.S. 37 (1971). *See Simpson v. Rowan*, 73 F.3d 134 (7th Cir. 1995). Therefore, the purposes of *Heck* are being applied in all circuits including the Seventh. Section 1983

cases are not being tried while criminal prosecutions are ongoing. There is no reason that Dr. Shamaeizadeh should have his claim derailed when his case is not on point, just to straighten out any problem this Court might have with the Seventh Circuit Court of Appeals.

To affirm all of the circuits to straighten out the Seventh Circuit would cause delay that would be an injustice to Dr. Shamaeizadeh. Further, the Seventh Circuit's ways cause no harm. The rules are now written. What does it matter that the Seventh Circuit differs from the others? Statutes of limitations differ as to all states, yet the court systems work. All that is required is that we know what the rules are. Petitioners have offered no compelling reason of national importance for the rules to be changed. Instead they ask the Court to change the rules and therefore require a whole new round of cases be decided to interpret these new rules. This serves no purpose. The system is now in place and the Court would serve everyone's interest by leaving it in place.

CONCLUSION

WHEREFORE, the Petitioners' request for a Writ of Certiorari should be denied.

Dated: October 28, 1999

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 9 1999
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No. 99-562

IN THE
SUPREME COURT OF THE UNITED STATES

Joel Cunigan, Mark Wiles, Asst. Chief Wayne Green, Sam Manley, John Telek, Richmond Police Department, The City of Richmond, Kentucky,

Petitioners,

v.

Ali Shamaeizadeh, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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STATEMENT OF THE CASE

Petitioner accepts the additional facts, regarding the criminal prosecution of Respondent, recited in the "Statement of the Case" contained in Respondent's Brief in Opposition to the Petition for Writ of Certiorari. Petitioner clarifies, however, that while state criminal charges were brought against various Defendants and subsequently dismissed in state court, Respondent was not one of those "Defendants" as he was never arrested on state criminal charges nor prosecuted in state court proceedings. While Respondent's "Statement of the Case" does not clearly recite this, Respondent's Opposition Brief admits it in the statement: "Respondent was not a state-prosecuted individual but instead was indicted in federal court." Opp. 4. With respect to the facts in this case, therefore, the parties are in full agreement.

REASONS FOR GRANTING THE PETITION

Respondent's Opposition Brief attempts to gloss over the confusion that Heck v. Humphrey, 512 U.S. 477 (1994) has created and continues to create in the lower courts. Respondent misunderstands the nature of the first question presented in the Petition. Furthermore, while Respondent admits that a split in the circuit courts of appeals exists as to the second question presented, Respondent fails to recognize the intolerable situation that will exist if that split continues.

I. THE RULE IN HECK DOES NOT PROPERLY APPLY UNLESS THE PLAINTIFF HAS BEEN CONVICTED AND INCARCERATED SUCH THAT HABEAS CORPUS IS IMPLICATED.

Respondent's first argument for denying certiorari is that there are no splits in the circuit courts of appeals with regard to applying Heck to Bivens actions for exonerated defendants of

federal prosecutions. Opp. 2-3, citing Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Respondent's argument, however, misunderstands the first question presented in the Petition for Writ of Certiorari.

The Heck majority and concurring opinions all recite that the rule established in Heck stems from the fact that the case "lies at the intersection" of the Civil Rights Act of 1871, 42 U.S.C. §1983, and the federal habeas corpus statute, 28 U.S.C. §2254. Heck, 512 U.S. at 480, 490 & 491 (Scalia, J., majority opinion) (Thomas, J., concurring) (Souter, J., concurring). The latter of these statutes, §2254, expressly grants persons held in 'state custody' the right to seek a writ of habeas corpus in federal court against state authorities, but only after exhaustion of available remedies.

While it is true that many circuit courts of appeals have applied the Heck rule in Bivens actions, this Petition does not concern whether Heck should or should not be applied in such actions for the simple reason that no federal officials have been sued in this case on any Bivens claim. This is a *§1983* action brought against a municipality and certain of its police officers, all of whom were acting under the color of *state* law. Accordingly, no issue is presented in this case as to whether Heck should apply equally as between Bivens claims and §1983 claims as Respondent apparently believes. Rather, the issue in this case is whether the rule in Heck should be extended to a situation where the criminally accused (Respondent) was never convicted or incarcerated and thus never had habeas remedies available to him.

The first question presented in the Petition poses the issue as whether the favorable termination rule in Heck is properly applicable "when the §1983 plaintiff was never convicted nor held in 'state custody' within the meaning of 28 U.S.C. §2254." The question is so phrased because Respondent was, in fact,

never arrested by any state authority nor held in state custody on any state criminal charges arising out of the search of his premises. This is important if the rationale for the Heck rule is solely to avoid collisions at the intersection of §1983 and §2254 as stated in Justice Souter's Heck concurrence, as stated in the concurring and dissenting opinions in Spencer v. Kemna, 523 U.S. 1, ___, 118 S. Ct. 978, 988 & 990 (1998) (Souter, J. concurring, joined by Justices O'Connor, Ginsburg, and Breyer) (Ginsburg, J., concurring) (Stevens, J., dissenting), and as applied in the lower court decisions that follow the narrow view of Heck. This distinction may be less important if Heck is interpreted broadly in accordance with the Heck majority opinion and those lower court decisions that follow the broad view of Heck.[1]

Respondent, therefore, misconstrues the first question presented in the Petition. There is, indeed, a serious conflict as to how to interpret Heck. The lower courts are hopelessly split as to whether Heck should be applied broadly in accordance with the majority's rationale in Heck or narrowly in accordance with Justice Souter's Heck concurrence. The District Court below properly construed Heck narrowly so as to refuse to apply it to a §1983 plaintiff (Respondent) who has never been

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[1] In footnote 1 of the Petition, several decisions applying Heck to Bivens actions are cited. These citations illustrate one facet of the broad view of Heck. If Heck is interpreted narrowly, applicable only to cases at the "intersection" of §1983 and §2254, then cases applying Heck to federal prisoners alleging Bivens claims must be deemed an extension of the Heck rule since federally convicted prisoners are not held in 'state custody,' and thus are not subject to §2254's exhaustion requirement. Nothing in the Petition suggests that Heck's favorable termination rule, which is properly applicable to a convicted *state* prisoner's §1983 claim, should be inapplicable to a convicted *federal* prisoner's Bivens claim. To the extent Respondent believes the Petition makes such a suggestion, Respondent misses the issue.

tried or convicted, nor held in state custody so as to implicate habeas corpus. Under the narrow view of Heck--which applies Heck only to convicted inmates who have no available habeas remedy--the decision of the Sixth Circuit Court of Appeals below is clearly in error.

This Court must grant certiorari to resolve the lower courts' conflicting interpretations of Heck. The proper interpretation of Heck can only be clarified by this Court because the concurring and dissenting opinions in Spencer collectively suggest that Heck should be deemed inapplicable when no habeas remedy is available to the §1983 plaintiff. As pointed out in the Petition, numerous circuit decisions have noted the concurring and dissenting opinions in Spencer, but no circuit decision can resolve the conflict as to how narrowly or broadly the Heck rule should be applied.

Continuing uncertainty as to the proper interpretation of Heck is untenable since the favorable termination rule Heck establishes directly affects when a §1983 cause of action accrues and thus when the applicable period of limitations begins to run. Furthermore, the need for the lower courts to be uniform in their decisions regarding the commencement of limitations provides compelling reason to grant certiorari. Cf. Wilson v. Garcia, 471 U.S. 261, 266 (1985) (lower court confusion and uncertainty in applying limitations for §1983 claims provides "compelling reasons for granting certiorari"). This Court should, therefore, grant certiorari on the first question presented in the Petition.

II. THE ADMITTED SPLIT BETWEEN THE CIRCUIT COURTS OF APPEALS REGARDING HOW TO APPLY HECK MUST NOT BE ALLOWED TO CONTINUE.

Respondent admits in his Opposition Brief that a direct split in the circuit courts of appeals exists regarding the second question presented in the Petition. Opp. 4. Respondent claims, however, that this admitted split exists only between the Seventh Circuit Courts of Appeals and all other circuits. Respondent cites several slip opinions from several of the circuits with dates from 1997 and 1998 in support of this argument, but given the age of these slip opinions, it would appear the decisions were never published. They should not, therefore, negate Petitioner's analysis of the circuit split.

The Petition shows, from citations to published decisions, that the Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals follow a similar approach in their application of Heck's footnote 7, but that the Sixth, Second and Fifth Circuits follow a different approach. The Sixth Circuit's opinion below reveals a similar count in the circuit split except that the opinion below fails to include the Ninth Circuit as aligned with the Seventh. Compare Pet. App. 8a-9a and cases cited therein with Pet. 18-28 and cases cited therein.

Regardless of how the circuit decisions are counted with respect to the split, Respondent and Petitioner agree completely that the Sixth and Seventh Circuits have diametrically opposed interpretations of Heck footnote 7. See Opp. 4 ("[t]he Seventh Circuit...is admittedly different"). Respondent trivializes this difference, however, and in effect, asks this Court to ignore it. Respondent claims that the Seventh Circuit's approach is "to allow all Fourth Amendment lawsuits to be filed but then abstains from them under Younger v. Harris, 401 U.S. 37 (1971)." Opp. 4, citing Simpson v. Rowan, 73 F.3d 134 (7th Cir. 1995). Respondent goes on to express that "the purposes

of Heck are being applied in all circuits including the Seventh....[, but t]here is no reason that [Respondent] should have his claim derailed...just to straighten out any problem this Court might have with the Seventh Circuit Court of Appeals." Opp. 4-5.

Respondent's argument fails to recognize that the split which he would have this Court ignore makes the difference in whether his §1983 claim is deemed to accrue on the date Petitioners allegedly committed their unconstitutional conduct or at some later time when criminal proceedings against him were finally concluded. This difference--which flows directly from the difference between the Seventh and Sixth Circuits applications of Heck-- is outcome determinative in this case (the same as it would be in innumerable similar cases). Under the Seventh Circuit's approach, there is no question but that Respondent's illegal search claim accrued immediately when he knew or should have known the search occurred. Under the Sixth Circuit's approach, his claim never accrued until his criminal prosecution concluded and thus his claim was saved from being time-barred.

Respondent seems to argue that because he was not state-prosecuted but rather federally prosecuted, this case is an inappropriate vehicle to resolve the admitted conflict between the circuits as to the proper application of Heck in illegal search cases. See Opp. 4. Nothing, however, could be further from the truth. The facts in this case squarely present the issue on which the split in the circuits exists. Indeed, it is precisely because no state prosecution ever occurred against Respondent that this case presents a *clean* set of facts upon which to resolve whether Heck is properly applicable in situations where there has been no 'state custody' within the meaning of 28 U.S.C. §2254 (i.e., the first question presented in the Petition).

Furthermore, no reason exists to deny certiorari merely because the Seventh Circuit may abstain from entertaining some §1983 claims (pursuant to Younger or some other

abstention doctrine). The issue in this case is not whether or when the courts should abstain from hearing §1983 claims *after* they are timely filed, but rather when courts should fix the accrual date for such claims to determine *if* they are timely filed (within applicable limitations). Moreover, any issue as to whether Younger abstention would have been applicable to Respondent's §1983 claim (had it been timely filed) has no bearing in this case precisely because Respondent was never state-prosecuted. Thus, the second question presented in the Petition, whether search and seizure claims represent an exception to the favorable termination rule of Heck, could not be more *cleanly* framed focusing solely on the accrual issue with no extraneous or complicating facts.

Finally, Respondent's suggestion to simply allow the split to continue ignores the wholly intolerable situation that will abide should certiorari be denied. A dispute in the circuits as to when to fix the accrual date for §1983 unlawful search and seizure claims is not an insignificant matter. Section 1983 has been characterized as an "important [and] ubiquitous" civil rights statute (Wilson, 471 U.S. at 266) and one of the "most fertile sources of federal-court" litigation (Heck, 512 U.S. at 480); moreover, illegal search and seizure claims represent a significant portion of that litigation. Consequently, a continuation of the split in the circuits will only prolong an intolerable confusion and uncertainty among the lower courts and legal community.

No better example of such intolerable confusion can be found than the case of Day v. Zubel, 922 P.2d 536 (Nev. 1996). Day is a legal malpractice action brought because of a lawyer's incorrect prediction as to when his client's §1983 claim accrued and thus when the period of limitations commenced and later expired. The reason the lawyer miscalculated the period of limitations was apparently because the lawyer was uncertain how long Heck's favorable termination rule delayed the accrual

of his client's claim. Members of the bar should not be faced with the threat of such malpractice actions anymore than lower courts' dockets should be clogged by the filing of such actions. Certainty in the determination of the accrual of §1983 claims would obviate such actions, and is therefore an absolute necessity in this area of the law.

This Court has previously observed with respect to §1983 time limitations: "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Wilson, 471 U.S. at 266. This case presents just such a situation. Indeed, the issue in this case may be even more significant than the limitations issue presented in Wilson because determining the proper accrual date of a claim determines not just *when* the claim may be filed, but also *whether* the claim may be filed at all.

The split in the circuit courts of appeals as to when illegal search and seizure claims accrue is in need of immediate repair. There can no longer remain a lack of uniformity on this crucial issue. The Sixth and Seventh Circuits' admitted split on the issue has fully ripened and is irreconcilable. See Pet. 19-20, 29. The facts of this case, being undisputed, present this Heck accrual question squarely and cleanly. Accordingly, there exists no good reason not to grant certiorari in this case, and indeed, every reason exists why certiorari must be granted to resolve the lower courts' intolerable split concerning the second question presented in the Petition.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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